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ABSTRACT

This document comprises resource materials on the education of homeless children. It is divided into three parts. Part 1, "Overview," collects publications of the Center for Law and Education, and articles and editorials from "Education Week" and "The New York Times." Part 2, "Relevant Statutes and Regulations," provides materials pertaining to the education provisions of the Stewart B. McKinney Homeless Assistance Act, compiles state school residency laws, and lists the regulations and guidelines for the education of homeless children mandated by the State and City of New York. Part 3, "Cases and Pleadings," provides materials on the following cases: (1) Richards v. Board of Education of Union Free School District No. 4; (2) Delgado v. Freeport Public School District; (3) Mason v. Board of Education, Freeport Union School District; (4) Vingara v. Borough of Wrightstown; (5) Tynan v. Wooley; and (6) Orozco v. Sobol. (BJV)

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Materials on

Education of Homeless Children

Compiled December, 1987 by

Shelley Jackson, Staff Attorney

[These materials were updated through October 3, 1988, and will be updated regularly.]

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MATERIALS ON THE EDUCATION OF HOMELESS CHILDREN

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These materials were compiled in December, 1987 for the NLADA Annual Conference, and have been updated through October 3, 1988.

For more information, contact Shelley Jackson, Staff Attorney at the Center for Law and Education (617-495-4666).

(10/3/88)

I. OVERVIEW

CENTER FOR LAW AND EDUCATION
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THE EDUCATION RIGHTS OF HOMELESS CHILDREN

by Shelley Jackson, Staff Attorney
September, 1988

I. INTRODUCTION AND OVERVIEW

Significant obstacles confront homeless school-aged children in obtaining and maintaining access to free public education. Homeless children have faced outright exclusion from school, as well as a variety of ancillary problems that can preclude continued school enrollment. The problems of these especially vulnerable students have become apparent as homelessness continues to claim an increasing number of families and children as its victims.

In 1987, the Center for Law and Education, the National Coalition for the Homeless, the National Network of Runaway and Youth Services and the Homelessness Exchange joined forces to document the extent to which homeless children experienced difficulties in enrolling and continuing in school. A collaborative survey of approximately 110 shelter providers throughout the country revealed that one-third of these providers knew of instances in which homeless children had been denied access to school as the result of local enforcement of state school residency or guardianship laws. Shelter providers reported that homeless children were barred from their district of origin for alleged failure to establish that they still resided there, barred from the district in which a shelter, hotel or other temporary accommodation was located for alleged failure to establish a "permanent" residence, and that children whose homeless parents had placed them temporarily with others were barred from districts in which their caretakers lived if the caretaker was not a parent or the child's legal guardian. A variety of other problems also kept homeless children out of school, including lack of adequate transportation, the inability to obtain or get speedy transfer of prior school or health records and the denial of special services (including special education compensatory education for the educationally disadvantaged, school meals, services for limited english proficient students and programs for the gifted and talented). A subsequent 1987 Center for Law and Education survey of state department of education officials, however, revealed that these persons had little knowledge of either the numbers of homeless school-aged youngsters within their jurisdictions or the problems these students faced.

II. THE McKINNEY ACT

A. The Act's Education Provisions

Congress responded to advocacy on behalf of homeless persons, including homeless school-aged children, through the July, 1987 passage of the Stewart B. McKinney Homeless Assistance Act[1]. This omnibus $1 billion legislation established many programs to aid homeless persons in fiscal years (FY) 1987 and 1988, and included a section designed to ensure equal access to education for homeless children.

The McKinney Act's education provisions[2] are premised on two Congressional policies -- that all homeless children have the same right to a free appropriate public education as that given to non-homeless students; and that states review, and if necessary, revise their school residency laws in order to preclude their use as a tool to bar homeless children from school[3]. The Act establishes a two-year program of voluntary federal grants to state educational agencies. McKinney requires grant-recipient states to use their grant money to (1) establish or designate an office as the "Coordinator of Education of Homeless Children and Youth"; (2) compile data on the number of homeless children within their jurisdictions and the nature and extent of those children's problems in obtaining an education; and (3) write a "state plan" for educating these students, including a mechanism to resolve disputes concerning a homeless child's education placement. In addition, the Act establishes a uniform standard for determining where homeless children will attend school. State plans must ensure that local school districts enroll these students in accord with the "best interest of the child", rather than on the basis of administrative convenience or cost. Local districts must also provide homeless students with educational services, such as those mentioned above, on the same basis as these services are provided to non-homeless youngsters, and ensure the timely availability of school records when homeless students move from one district to another[4].

Congress authorized $12.5 million for McKinney education grants, including $5 million in guaranteed grants to states for fiscal years 1987 and 1988, and an additional $2.5 million in exemplary grants to state or local educational agencies in FY 1988. Congress subsequently appropriated $4.6 million for FY 1987 state grants, and $4.7 million for FY 1988, but failed to appropriate money for the exemplary grants, which were to have been awarded on a competitive basis and used to fund model educational programs. Although the Reagan Administration's FY 1989 budget eliminated federal funding for the education of homeless children, legislation has been introduced to reauthorize the education provisions for FY 1989 and 1990, including an authorization of $6 million each year for state grants, and an additional $2.5 million annually for exemplary grants.

B. Implementation

The U.S. Department of Education (ED) announced the availability of McKinney monies in December, 1987, and set an April 30, 1988 deadline for applications for the first round of grant monies. All 50 states and the District of Columbia applied for McKinney grants, which were allocated according to a population-based formula that gave each state at least $50,000. ED required that states use their first year's grant monies to gather data on the number of homeless students and their education problems, and required the provision of a state plan as a condition of eligibility for the second round of grant monies. The current application date for the second round is April 30, 1989.

In May, 1988, the Center for Law and Education conducted a follow-up survey of state educational agencies to assess the level of state implementation of the McKinney Act. Survey questions were designed to determine whether states had specific plans to review or revise school residency laws, whether states had modified their enrollment policies or practices in the aftermath of McKinney but prior to the existence of a state plan, and whether states intended to seek out homeless persons and their advocates in gathering data about this problem.

The responses to the 1988 survey, in contrast to the information submitted prior the passage of the McKinney Act, indicated that states are generally aware of the problems of homeless student access, and beginning to take steps to address these problems. Thirty two states responded to the Center's survey. Most of these respondents indicated a current or planned review and possible revision of state residency laws. Most notably, New York reported that its Board of Education promulgated regulations in May, 1988 to allow homeless parents to choose whether their children would attend school in either the district in which their temporary accommodations were located, or the district in which the child had last attended school before becoming homeless. Connecticut reported that its school residency law had been amended in 1987 to explicitly provide that homeless children could attend school in either the district of temporary residence or the district of origin. Connecticut advocates report, however, that under this law, the district of origin, rather than a homeless parent, has the power to determine whether the child will continue attending school in his or her prior district, or be enrolled in a district of temporary residence with tuition paid by the district of origin.

Education officials in California, Kentucky, Maryland and Virginia announced that they intended to promulgate interim guidelines or other advisory opinions to local school districts to govern homeless student access during the 1988-89 school year. Wisconsin reported that it planned to work with local districts to ensure that students who become homeless during the school year are maintained in their district of origin until that year ends. Ohio and Oklahoma reported that their states were in the midst of developing additional procedures to review local decisions regarding homeless student enrollment. Finally, 21 states indicated that they planned to include homeless persons and/or their advocates in efforts to gather data about homeless student access. These outreach activities included conducting surveys of advocates, appointing advocates or homeless persons to state advisory committees or task forces considering homeless education issues, and, in Iowa, Kentucky, Vermont and Virginia, planning for public hearings or direct interviews with homeless persons.

III. ADVOCACY

A. Litigation

There is a small body of litigation concerning the rights of homeless children. The majority of these cases, however, were brought prior to the passage of the McKinney Act, and rely on legal arguments concerning state school residency laws. At least two cases from New York, the administrative complaint Tynan v. Wooley[5], and the federal district court case Orozco v. Sobol[6] rely in part on the McKinney Act, but these cases were brought prior to the passage of the New York state regulations ensuring parental choice in homeless student enrollment.[7]

After the development of interim guidelines or other policies regarding homeless student enrollment, legal services attorneys should consider challenging inequitable policies as violative of the McKinney "best interest" standard. It might also be argued, even prior to the adoption of a state plan, that the continued use of a discriminatory school residency standard violates the equal access policies on which the Act's specific requirements are based, but there is less legal ground for this type of challenge.[8] Advocates might also raise due process claims to challenge the arbitrary denial of access to homeless students without procedural safeguards.[9] Finally, in the event that a homeless child is completely excluded from school, advocates can rely not only on the McKinney Act, but state constitutional rights to an education and federal equal protection guarantees.[10]

B. Other Strategies

The McKinney Act gives states substantial power in determining how homeless children's problems would be identified, evaluated and addressed. As a result, vigorous advocacy is imperative in order to ensure that states do not make these decisions in a vacuum, without the input or direction of homeless parents and students. Homeless clients and their attorneys can work to make sure that state officials seek out the views of the homeless in meeting the education needs of these children and writing the state plan. Issues of particular importance include: the incorporation of parental choice regarding school enrollment into the McKinney "best interest" standard; the development of impartial procedures for resolving disputes about school placement (including procedures that are speedy and do not disrupt a child's education); and guaranteeing that any "best interest" standard, including one based on parental choice, is meaningful by forcing states to allocate sufficient resources to provide homeless children with adequate transportation to and appropriate services in their educational programs.

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1. Pub. L. 100-77 (7/22/87), codified at 42 U.S.C. §§11301 - 11472.

2. Id., Title VII, Subtitle B, §§721-25, codified at 42 U.S.C. §§11431 - 11435.

3. 42 U.S.C. §11431.

4. 42 U.S.C. §11432.

5. No. 12010, N.Y. Dept. of Education (1988), concerning children denied access in the school district in which their temporary housing accommodations were located. The N.Y. Commissioner of Education ultimately ruled that the district in which the temporary housing was located was the petitioner's "current and sole residence", and ordered that district to recognize the homeless Tynan children as residents and admit them to school.

6. No. 87 Civ. 6822 (S.D.N.Y. filed 9/18/87; preliminary injunction issued 674 F. Supp. 125 [S.D.N.Y. 1987]), raising issues of the denial of procedural due process in homeless school enrollment decisions and alleged inadequate legal remedies for indigent students to challenge local enrollment decisions.

7. In June, 1988, attorneys for the plaintiff in Orozco filed a memorandum of opposition to the state and local defendants' motion to dismiss. Defendants asserted that the plaintiff's claims had been rendered moot due to her move from New York to Puerto Rico and the adoption of two 1988 New York state regulations on school residency, including one establishing some limited procedures in school residency determinations and another regarding the school enrollment of homeless children. Plaintiff's attorneys asserted that there was sufficient likelihood of the plaintiff's return to New York to make this case "capable of repetition, yet evading review", and argued that the 1988 education regulations were not extensive enough to satisfactorily address the range of the plaintiff's due process complaints. See Plaintiff's Memorandum of Points and Authorities in Opposition to Motions to Dismiss, Orozco, supra (S.D.N.Y. filed 6/2/88) (Clearinghouse No. 43,336F)

8. See, e.g. the rejection of a legal challenge based on the "policies" of the Developmentally Disabled Assistance and Bill of Rights Act in Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 101 S.Ct. 1531 (1981).

9. See Orozco, supra.

10. See Plyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382 (1982).

**CENTER for
LAW and EDUCATION, Inc.** NEWSNOTES
Larsen Hall — 14 Appian Way Cambridge, Massachusetts 02138 (617) 495-4666
No. 38 **September, 1987**

Homelessness: A Barrier to Education for Thousands of Children

Homelessness, a societal crisis now claiming an increasing number of families and children as its victims, is inflicting special damage on homeless school-aged youths by barring or impeding these children's access to education.

Recently-gathered information from a number of sources indicates that the transient, uncertain existence of the homeless and the application of state or local school attendance and transportation policies to homeless students have combined to keep these children out of school, or to make their continued attendance an almost impossible task for families without permanent shelter. In an effort to address this problem, children's advocates have collected data about the existence and extent of barriers to educational access, worked for the passage of federal legislation to guarantee homeless students their educational rights, and, in New York, are beginning to litigate the question of whether residency laws and regulations can effectively keep homeless children out of the classroom.

Although the total number of homeless persons in America is often disputed (estimates range from 300,000 to three million), there is a growing body of data indicating that the number of families and children who live without permanent housing is increasing at an alarming rate. A 1987 study by the New York-based Partnership for the Homeless stated that homeless families now comprise the largest portion of the homeless population, and, based on data provided by forty cities, reported that children under the age of sixteen constituted between 18.2% and 19.8% of those cities' homeless. The results of a U.S. Conference of Mayors survey of twenty-nine cities reported that families represent approximately one-third of the homeless populations in those cities, and that the number of homeless families is expected to increase.

In addition, advocates are beginning to collect data dealing specifically with the impact of homelessness on education. The preliminary results of an eight-city survey by the Child Welfare League of America indicate that 43% of homeless school-aged children do not attend school. Seventeen cities responding to the U.S. Conference of Mayors survey reported that homeless children experienced problems relating to unstable school attendance and lack of access to education.

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Special Issue

The Educational Rights of Homeless Children

Photo by Marianne Gontarz

The articles in this issue were researched and written by Center for Law and Education Staff Attorney Shelley Jackson, with the assistance of Lucy R. Watkins, Education Advocate, and Paul Weckstein, Director of the Center's Washington, D.C. office.

New Federal Act Protects Education Rights of Homeless Children

Two years of legislative advocacy on behalf of the children of homeless families and homeless or runaway youth came to fruition in late June, when Congress enacted the "Stewart B. McKinney Homeless Assistance Act". This legislation, an omnibus package of several programs benefitting homeless persons, includes a provision designed to ensure that no homeless child is denied access to education. President Reagan signed the McKinney Act into law on July 22, 1987, and it is effective upon enactment.

The Act's education provision states Congressional policy that homeless children have access to a free, appropriate public education on an equal basis with non-homeless children, and that state residency laws not be used as a tool to bar homeless youngsters from school. The new law establishes a $12.5 million, two-year grant program to assist states and localities in implementing Congressional policy through study, planning and the provision of education to homeless children.

The McKinney Act guarantees all states a share of five million dollars annually in federal fiscal years 1987 (currently in progress, ending September 30, 1987) and 1988 (beginning October 1, 1988), distributed according to a formula that parallels state funding allocations under the Chapter 1 program. Each recipient state will be given at least $50,000 per fiscal year. Although states do not have to apply for these grants, the Act sets aside money for every state.

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Homelessness

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The lack of access to school or difficulties in obtaining an education are among the myriad of problems that confront families struggling to survive on the streets, in shelters, in "welfare motels" and other temporary accommodations.

In February, 1987 the Center for Law and Education, the National Coalition for the Homeless, the Homelessness Exchange and the National Network of Runaway and Youth Services collaborated on a survey of approximately 110 shelter providers (including family shelters, soup kitchens and shelters for runaway youth) throughout the country. The results showed that one-third of these providers knew of denials of educational access to the homeless.

Shelter providers reported (1) cases in which residency laws were used to bar continued access to the schools or school districts where students had been enrolled before their homelessness required a temporary move out of the school attendance area, (2) cases in which residency laws were used to preclude initial access to schools or school districts serving the attendance area where a homeless student is temporarily housed and (3) cases in which schools used guardianship laws as a barrier, by refusing to consider a homeless child as a resident unless the child lived with a parent or legal guardian. These guardianship requirements can affect children who are separated temporarily from their family, and living with a friend or relative who is not a legal guardian, as well as homeless runaway youth.

In addition, approximately 23% of those responding to the survey of shelter providers knew of instances in which homeless students' educational access had been hampered by the inability to obtain prior school or health records. Nineteen percent reported the denial of special services, including special education, and 15% reported that inadequate or unavailable transportation had been a barrier to educational access.

Anecdotal information from published newspaper reports, and the first-hand experiences related by shelter providers, flesh out these statistics to paint a revealing picture of the hard life of a homeless student. Every day, these children confront abject poverty, poor nutrition, transiency and frequent absences in efforts to complete their homework, remain attentive in class and continue to advance in their studies. In some cases, the stress of homelessness and the need to meet other family needs relegates a child's education to low priority status. Homeless students often endure the ridicule of their peers, and are derided as "hotel kids". Dr. Ellen Bassuk, a psychiatry professor at the Harvard University Medical School, studied 156 Massachusetts homeless children, and found evidence of the damage inflicted by a life on the streets and in temporary accommodations. Many very young children in this study suffered from developmental delays, and, on the average, manifested more of some behavioral problems than young non-homeless children who had been diagnosed as "emotionally disturbed". School-aged children who completed Bassuk's psychological tests often scored above the recommended cut-off points for psychiatric referral and evaluation. Thus, homelessness itself may be creating a generation of children who have special educational needs, even as these youths' lack of permanent shelter bars them from the classroom and from receiving other services often offered to special needs students.

Photo by Jim Hubbard

No Action From The States

In contrast with the experiences and reports of shelter providers and others who have direct, daily contact with homeless families and children, state Department of Education officials appear largely uninformed about the presence of homeless children within their state, the extent of these children's educational needs and whether homeless youths receive an education at the local level. In March, 1987, the Center for Law and Education sent a questionnaire regarding state practices and policies for homeless students to the chief state school officers in the fifty states and the District of Columbia, and received twenty-three responses. The majority of the respondents, however, had no statewide data on the number of homeless children within their jurisdictions or whether those children were able to obtain an education. The majority of states had no uniform plan for ensuring that homeless students received an education.

Thirteen respondents either returned the questionnaire unanswered, claiming they had "insufficient data" to complete it, or reported that they did not compile the information it requested. Four state school officials indicated that other non-education state agencies might have the requested information, and forwarded the questionnaire to those agencies. Of these four, only the District of Columbia has subsequently responded.

Only eight respondents, from Alaska, the District of Columbia, Hawaii, Maryland, New York, North Carolina, South Carolina and Wyoming, provided any substantive information in response to the Center's survey. In almost all cases, however, these respondents did not answer every question. Six of these states reported that they have a homeless, school-aged population, but only two officials (from New York and D.C.) were able to estimate how many homeless children attended school in their jurisdictions. Only Hawaii reported that guidelines existed for determining where homeless children will be educated, but failed to elaborate. Only New York reported that state and/or local initiatives had been proposed to address the educational rights of homeless children.

The reports from state Department of Education officials and from shelter providers differed most sharply regarding the outright denial of or barriers to educational access. Only the New York Department of Education was aware of

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Homelessness

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the practice of school districts denying access to homeless children, perhaps in part because this issue has been litigated in that state. Similarly, only New York was aware of homeless children being denied access to various special educational programs (special education for the disabled or vocational education, for example). Only three respondents reported arrangements to provide and pay for transportation if a homeless child continues to attend school in a former district of residence, and four reported arrangements for transportation if the child goes to school in area in which the family's temporary accommodations are located. And, although shelter providers cited the inability to obtain records as the primary ancillary barrier to educational access for the homeless, not a single state Department of Education reported that a child's inability to obtain records prevent him or her from entering the classroom.

Local and National Advocacy

As documentation regarding the educational problems of the homeless piles up, these children's needs are also getting increased attention through legislative and litigation efforts. In late June, Congress enacted an omnibus homeless aid package, including a provision designed to provide educational access to all homeless children. (See "New Federal Act Protects Education Rights of Homeless Children," in this issue.)

To date, three cases, all in New York, have challenged the outright denial of educational access to homeless students. In each case, local school districts relied on their interpretation of New York residency standards to hold that the affected homeless plaintiffs were not "residents" of the school district and barred the students from school. In the absence of a state law or policy establishing a uniform approach to educating homeless children, the resolution of each of these disputes has been governed by a "case-by-case" determination standard set down by the New York Commissioner of Education. This litigation has produced mixed results; one family succeeded in forcing the family's prior district of residence to allow its homeless children to attend school there, but two subsequent plaintiffs, who also wanted their children to continue attending the schools in which they were enrolled prior to becoming homeless, were ordered to enroll the children in the school district in which the family's temporary shelter was located. (See "Advocates in New York Challenge Denial of Education to Homeless Children,' in this issue.)

In addition, at least two other non-education cases brought on behalf of homeless families discuss homelessness as a barrier to educational access. In *Massachusetts Coalition for the Homeless v. Dukakis*, an ongoing case, homeless plaintiffs charge that state welfare benefits are insufficient to allow recipients to obtain affordable housing in which to raise their families. Through affidavits, these plaintiffs voiced concerns about the impact of homelessness on their children's education. For example, one plaintiff stated that she and her two children had moved three times in four months within one city, and that, as a result, her daughter had changed schools three times. Another plaintiff reported her difficulties in transporting her five school-aged children, including two handicapped children, back to school in their former school district from temporary motel accommodations sixteen miles away. In *Hansen v. McMahon*, a case challenging the California Department of Social Service's refusal and inability to provide overnight shelter for homeless families, plaintiffs' affidavits detailed cases in which homeless children fell behind academically and missed long periods of school while their families sought shelter. One shelter operator submitted an affidavit in *Hansen*, stating that she knew of homeless children who had not attended school in two years. (This case was ultimately decided in favor of the plaintiffs.)

The Center for Law and Education continues to gather data on the educational needs of the homeless, and will disseminate information about legislative mandates and advocacy strategies that may assist homeless students. The Center will also participate in a panel on the needs of homeless clients at the upcoming December, 1987 National Legal Aid and Defender Association convention in Miami. Legal services attorneys and other advocates who wish to share or receive information on this issue should contact Shelley Jackson at the Center's Cambridge office.

New Federal Act

(continued from page 1)

Any state choosing to apply to the Department of Education (ED) for these funds must use its grant to (1) gather data on the nature and extent of the problems of homeless youngsters' access to and placement in schools, and (2) develop and implement "state plans", ensuring that all homeless children are educated. States can either create or designate a state office as "Coordinator of Education of Homeless Children and Youth", which will be charged with carrying out these functions. These coordinating offices must submit interim reports to ED on their data collection by December 31, 1987, and file final reports by December 31, 1988.

State plans for education of the homeless must contain a provision authorizing state or local education agencies, the parents or guardians of homeless children, homeless or runaway youth or social workers to make decisions about the educational placement of and provision of services to homeless children. These plans must also establish a mechanism to resolve disputes concerning homeless students' educational placement.

"Best Interest of the Child" is the Determining Factor

State plans must, "to the extent practicable," be designed so that the affected local educational agencies will comply with the Act's provision for equal educational access for the homeless. Localities in participating states must enroll children who become homeless in either the school district in which the child was originally enrolled or the school district in which the child is actually living, whichever is in the child's "best interest". This provision of guaranteed access affects both homeless children who are living with their parents in temporary housing, and children whose homeless parents have placed them temporarily with others. Thus, schools can neither insist that children living apart from their parents reside with a legal guardian in order to be enrolled in school, or refuse to admit these youngsters unless homeless parents surrender their legal parental rights.

Localities must also provide educa-

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ED Begins Plans for Implementation

The Department of Education (ED) has begun planning implementation strategies for the elementary and secondary education provisions of the McKinney Act. ED has assigned primary responsibility to Tom Faegen, in the Department's Office of Compensatory Education Programs. He can be contacted at 2043 FOB-6, 400 Maryland Avenue, S.W., Washington, D.C. 20202 (202)732-4682.

According to Faegen, ED will notify states immediately about the McKinney Act by sending copies of the education provisions, and notice of the availability of grant monies, to state department of education officials in the fifty states and the District of Columbia. Education grant funds for federal fiscal year 1987 have already been appropriated.

Deadlines for grant applications will be announced shortly. At this writing, ED had not decided whether it would promulgate regulations to implement the new law, or issue non-regulatory guidelines instead.

New Federal Act

(continued from page 3)

tional services, such as special education, compensatory education for the disadvantaged, programs for limited-English-proficient students, vocational education, programs for the gifted and talented, and school meals to homeless children on the same basis as these services are provided to non-homeless students. The joint statement of conferees accompanying the Act states that transportation is also one of the services to be provided to homeless students in a non-discriminatory manner. Local educational agencies must also maintain the records of homeless children so that they are available in a timely manner when these children move to a new school district.

In addition to the funds provided under the basic grant program, the Act sets aside $2.5 million in competitive demonstration grants for federal fiscal year 1988. States and localities wishing to establish "exemplary programs" for educating the homeless can apply to ED for these funds, provided that the applicant is located in a state which has submitted a state plan.

Congress retained a supervisory role regarding education for the homeless by requiring reports from ED on each state's interim and final data reports within forty-five days after these reports are due. ED must also monitor and review state and local compliance with the McKinney Act in accordance with the provisions of the General Education Provisions Act (GEPA). GEPA gives ED the authority to require states to submit a plan for monitoring and enforcing local compliance with federal education grant program requirements. In addition, GEPA provides for the submission of state and local grant applications to ED that include assurances of monitoring by states, the availability of necessary technical assistance to local agencies, and state and local consultation with persons affected by federally-funded programs. ED must also give Congress an overall report on activities under the Act at the end of each fiscal year. This report is intended to cover activities in all states, including states that do not participate in the program. The General Accounting Office must give Congress a nation-wide estimate on the number of homeless children by June 30, 1988.

Although any state accepting McKinney Act funds must comply with the Act's requirements, states do not have to participate in this grant program. Non-participating states need not abide by the specific planning and data collection mandates that accompany the receipt of grant monies, but advocates may be able to argue that these states are nevertheless bound by the general equal protection policies on which the Act is based. These policies, advocating equal educational access for the homeless and rejecting the use of residency laws as a bar to school enrollment, are included in the Act's general provisions, and are not tied to the receipt of grant monies.

Advocates Can Play A Role

Successful implementation of the McKinney Act depends primarily on participation of all states in the program, and the content and scope of each participating state's plan. To that end, homeless clients and their advocates may want to take an active role in determining how state and local education officials plan to implement the Act (see suggested questions in box), and in paying particular attention to certain issues, including decisions governing these youngsters' educational placement and the provision of transportation to them.

Continued on next page . . .

Suggested Questions Regarding the Education Provisions of the McKinney Homeless Assistance Act

1. Will this state apply for a McKinney Act grant for the education of homeless children and youth?

2. What state office will be the designated "Coordinator of Education of Homeless Children and Youth"?

3. Will advocates for the homeless and homeless persons be involved in gathering data about the number, location, nature and extent of the problem of educating homeless youngsters?

4. What will be the process for developing the "state plan" to ensure all homeless school-aged children are educated? Will this process include: a) public hearings? b) consultation with or involvement of homeless persons and their advocates?

Under the state plan:

5. Who will determine the "best interest" of a homeless student? Will parents be deemed to know the child's "best interest"? If not, how will the parent's views be taken into account? In the case of homeless or runaway youths, will their views and those of shelter counselors be taken into account?

6. What will be the standard for the "best interest" of a homeless child? Will this standard give enough weight to:
   - the need to avoid disrupting the child's education?
   - problems parents and children may face if forced to commute long distances without having transportation provided by a local school district?
   - Parents' intent about future residence — to either return to the child's prior school district, or to remain in the school district in which the family is temporarily sheltered?

7. Will school placement decisions meet the overall legal mandate to avoid discriminatory treatment of homeless children? Will these decisions assure:
   - That families residing in shelters are not treated differently from other, non-homeless residents when they seek to enroll their children in the attendance area where they are sheltered?
   - That families intending to return to their prior district of residence, and wishing to continue enrollment in that prior district, are not treated differently from other, non-homeless families who travel temporarily outside the district?
   - That children of homeless families who have been temporarily placed with a friend or relative will not be barred from school on the condition that the homeless parents surrender their legal parental rights?
   - That homeless or runaway youth will not be barred from school because they are not living with a legal guardian?

8. What procedures will be used to resolve disputes over a homeless student's educational placement? Do these procedures provide for a full and impartial determination of the child's best interest (independent decision maker, adequate notice, right to representation, to present and cross examine witnesses and evidence, findings, and appeal)? Do these procedures assure that a child's education will not be disrupted during the pendency of any dispute?

9. Will transportation always be provided to the school that meets the child's best interest?

10. How will state and local officials ensure that homeless students receive equal access to special educational services?

11. How will state and local officials ensure that the school records of homeless children are available in a timely manner when these children move to a new school district?

12. Are state school residency requirements being reviewed and revised to ensure that they do not interfere with the provision of a free and appropriate public education in the school that meets a homeless student's best interest?

13. Will state or local education officials be encouraged to coordinate with agencies responsible for placing homeless families in order to avoid disruption of education?

14. How will state officials publicize the Act's provisions and the requirements included in state plans to local education agencies?

15. What provisions will be made for monitoring local compliance with the provisions of the McKinney Act? Do these monitoring and enforcement tools include:
   - Site visits?
   - Collection of local data and reports?
   - Review of educational placement decisions?
   - Consultation with homeless persons and their advocates?
   - Well publicized complaint procedures?
   - Strict and effective timelines and remedies for correcting deficiencies?
   - Technical assistance?

New Federal Act

(continued from page 4)

The law seeks to avoid instances in which a child who becomes homeless during the school year is effectively barred from attending school in either the child's district of origin or district of temporary residence, if each district asserts that the child fails to meet applicable residency requirements (see summary of the *Delgado* case in "Advocates in New York Challenge Denial of Education to Homeless Children," in this issue). In those states receiving grants, homeless children are to be enrolled in one of the two school districts, in accordance with the child's "best interest", rather than on the basis of administrative convenience or cost. States must authorize state or local education agencies, the parents of homeless children, homeless or runaway youth or social workers to determine this standard.

Advocates could seek to ensure that states, in adopting a substantive standard for the best interest of the child, address the primacy of the parents' role. This parental involvement is supported by the Act's explicit recognition that homeless parents may be authorized to make decisions about their children's education, and by the need to formally acknowledge the view of parents who object to placement decisions through the dispute resolution mechanism required in each state plan. Advocates can play a major role in developing impartial procedures for resolving disputes, and for assuring a process that is speedy and non-disruptive to the child's education.

In addition, conference committee language states that local educational agencies must provide transportation "at the same level and to the same degree as ... offered to other students in that particular school." Advocates should rely on this language to ensure that localities plan transportation routes that are accessible to homeless children. In addition, when a proper placement decision, serving the best interest of the child, is made, transportation must obviously be provided where needed.

Other programs within the McKinney Act's education and training provisions include a $17.5 million adult literacy initiative and a $14 million job training program. The entire Act includes assistance in the areas of housing, health care (including mental health), emergency food and shelter, community services and special programs for homeless veterans. The Act carries a total authorization of $443 million for fiscal year 1987 and an additional $616 million for fiscal year 1988. Congress recently appropriated $355 million for FY 1987.

The Center for Law and Education will monitor the implementation of the McKinney Act's education provisions. Advocates and clients with questions about the Act or those seeking copies of it, as well as those with future information about its execution in their state should contact Shelley Jackson at the Center's Cambridge office.

Advocates in New York Challenge Denial of Education to Homeless Children

New York, generally regarded as the state with the country's largest reported homeless population, has been the focus of the most formal legal advocacy on the denial of education to homeless children, and the source of the most comprehensive information from state and New York City education officials on the nature and scope of this problem.

Homeless clients and their advocates have challenged the use of New York residency requirements as a barrier to educational access three times, once before the state Department of Education and twice in state court. The first legal case to consider this issue, *Richards v. Board of Education of Union Free School District Number Four*[1], was brought to a New York Department of Education administrative hearing. The plaintiff in this case, Mary Richards, was a homeless woman with two teen-age children from Port Chester, New York. The Richards family lost its home in the spring of 1984 when the Westchester County Department of Social Services decided that the apartment in which they lived was too hazardous, and relocated them.

During the first five months of the 1984-85 school year, the Richards lived in six different motels in five different school districts. The plaintiff retained strong community ties to Port Chester, and searched diligently for permanent housing so that the family could return there. Despite these efforts, the doors of the Port Chester schools were closed to the Richards youngsters. School officials prevented the plaintiff's daughter from enrolling in high school, and dismissed the plaintiff's handicapped son from middle school after he had attended classes for approximately six weeks. Officials justified this exclusion by arguing that the Richards children no longer satisfied state residency requirements, even though the Superintendent of Schools was aware that the family was currently homeless, staying in various school districts for only a brief period of time, and that the plaintiff intended to return to Port Chester.

After efforts to negotiate with school officials failed, Richards, represented by attorney Jerrold Levy at Westchester Legal Services, requested that the New York State Commissioner of Education declare all homeless children in temporary accommodations to be residents of the school district where they last had permanent housing.

The *Richards* case turned on the Commissioner's interpretation of New York's school residency statute, which states only that a person between five and 21 years old is "entitled to attend the public schools maintained in his district of residence."[2] The Commissioner, relying on existing case law, found that "a residence is not lost until another residence is established through both intent and action expressing such intent."

In July, 1985, the Commissioner decided the *Richards* case in favor of the plaintiff, but denied the across-the-board relief she had sought for all homeless students. The decision in *Richards* held that the plaintiff and her children remained residents of the Port Chester school district, and reached this holding by relying on the plaintiff's numerous and various efforts to return there. These efforts included attempting to obtain a public housing subsidy in Port Chester, continuing ties with church and family members there, receiving mail at a post office box there, and virtually living in Port Chester, returning to the various motels in which the family was living only to sleep. "Petitioner has not expressed or implied any intention of abandoning her residence in the district or any intention of establishing a residence in another district", the Commissioner held. "Until such an intent is expressed or can be inferred from her actions, petitioner and her children have not lost their status as residents of the Port Chester-Rye Union Free School District."

Commissioner Ordered Case-By-Case Decisions

The Commissioner rejected plaintiff's request that the Department of Education issue a declaratory ruling that would affect all homeless children. Finding that "determinations of residency are mixed questions of law and fact which do not

Continued on next page . . .

Advocates in New York

(continued from page 5)

lend themselves to general declarations", and arguing that policy determinations might not be served by requiring all homeless students to return to the district from whence they came, the Commissioner held that absent legislation, each conflict concerning the residency of a homeless child must be determined on a case-by-case basis.

This case-by-case approach set the stage for two subsequent court cases from Long Island, New York. *Delgado v. Freeport Public School District*[3] concerned a welfare recipient and her two sons, who had lived in the town of Freeport for twenty months before becoming homeless in December, 1985. The local social services agency placed the Delgado family in an emergency shelter for one month, and then in temporary housing in the Roosevelt School District.

Both the Roosevelt and the Freeport school districts refused to admit the Delgado children. Each district claimed its position was supported by state residency law, with Roosevelt arguing that the family had established no permanent residence within its jurisdiction, and Freeport asserting that the children had lost their residency status when they lost their home.

The plaintiff in this case preferred that her children attend the Freeport school district, but the *Delgado* court held the family's residence was Roosevelt, and that the children had to attend school there. Focusing on the fact that the children were currently in Roosevelt, the court dismissed the uncertainty surrounding the duration of their stay as "irrelevant". The court also found that the plaintiff failed to establish "significant or determinative ties" to Freeport. "What ties were shown amount merely to living there", *Delgado* held. "Such ties can be developed with ease wherever the family lives."

The third denial of education case, *Mason v. Board of Education, Freeport Union School District*[4], also involved the Freeport school district's application of residency requirements to homeless children. The Mason family, including a mother and five school-aged children, lived in Freeport for ten years before becoming homeless in October, 1986. In the seven months following their dislocation, the Masons moved eight times in five different school districts.

The Mason children were dismissed from the Freeport schools for lack of residency in November, 1986, and never returned to school during the 1986-87 academic year. Attorneys from the Nassau/Suffolk Law Services Committee (also counsel to the plaintiffs in *Delgado*) attempted to make a factual distinction between *Mason* and *Delgado*, by relying on the Mason family's long-standing ties to Freeport, the extremely temporary nature of shelter the family had received since becoming homeless, and the plaintiff's efforts to return to Freeport.

Photo by Marc Young

In April, 1987, a state court judge rejected these arguments, and ruled that the Mason children's "bodily presence" established their residence for school attendance purposes. At the time of the court's ruling, the Masons were living in Long Beach, New York, and the court held that the children were residents of that community, "notwithstanding the fact that such residence may not have been accompanied by an intention to dwell there permanently."

According to Edward Luban, the Nassau/Suffolk Law Services Committee attorney representing the Masons, this family ultimately found housing in late April, 1987, in Malverne, a Long Island town a few miles from Freeport. While the family searched for housing, the Mason children remained out of school. Luban reports that the plaintiff attempted to enroll her children in the Malverne schools after settling there, but her efforts were delayed while the children's school records were obtained and trans-

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Advocates in New York

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ferred. By the time these records arrived, Luban said, the Malverne school system said it was too late to enroll the Mason children in school, because the academic year was almost over.

Luban said that Nassau/Suffolk is considering an appeal in *Mason,* and cited both a "legal argument and an equitable argument" for challenging the court's ruling. "The legal argument is based on residency," Luban said. "The law says you don't lose residency in one place until you acquire it in another, and that didn't happen here. As for the equitable argument, I think you just have to look at what happened in this case."

The facts of and erratic results in each of these cases demonstrate the difficulties homeless students and their families face in continuing a child's education, and the wide range of possible decisions when school residency determinations are applied to these children on a "case-by-case" basis. If New York applies for and accepts homeless education funds under the new McKinney Homeless Assistance Act, such decisions would turn on the "best interest of the child" involved, rather than on interpretations of state residency law.

Homeless families and school-aged children in New York City won a court victory on an important related issue — the provision of or payment for school transportation — in the 1986 case of *McCain v. Koch.*[5] *McCain* upheld a lower court decision[6] ordering the New York City Department of Social Services (DSS) to provide adequate transportation allowances for homeless students. *McCain* ordered the city to pay the actual transportation costs incurred by children who, as a result of their homelessness, have a long commute between their school and a shelter, motel or other temporary housing. Local DSS officials must give these allowances to homeless schoolchildren until the Department of Education provides students with transportation passes to cover these costs, the court held. In addition, the *McCain* court ruled that the city must pay the transportation expenses of homeless parents who wish to accompany their children to school if the children are too young to make this commute alone.

Unlike most states, New York education officials do collect information regarding the numbers of homeless children within the state, and are beginning to devise strategies to ensure equal educational access for these students. In response to a March, 1987 survey conducted by the Center for Law and Education in cooperation with other advocacy groups, the New York State Education Department reported that 10,000 students (including 8,000 primary- and 2,000 secondary-aged youths) throughout the state are without permanent housing. Two New York State Education Department employees are charged with the responsibility for ensuring that homeless students enroll and remain in school.

NYC Ombudsman Appointed

Photo by Jim Hubbard

In late March, 1987, the New York City Department of Education, which has approximately 7,000 school-aged homeless youth within its jurisdiction, appointed its first "ombudsman" to provide educational services for children in temporary housing. That ombudsman reported that the City has established a "Central Hotel Project" to deal with the educational placement and attendance problems of these children. The city said that other efforts, including tracking and monitoring systems to assess school attendance and special education referrals (an estimated 8% to 10% of student hotel residents receive special education services), are also planned.

In response to the Center's survey, New York officials at the city and state levels suggested outreach to and support services for homeless parents as the most effective way to keep youngsters in school while they live in temporary shelters. A New York state official noted that legislation to address the problem of educational access for the homeless has been pending in New York for three years, and indicated that passage of such legislation would be "a good start." "But," she continued, "our schools resent these children. We must look not only at educational concerns but at the social and economic causes for homelessness and our lack of response to these root causes. We focus on refugee camps in Lebanon, yet we have a generation of children growing up in our own version of internment camps in New York State."

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1. No. 11490, N.Y. Dept. of Education (1985).
2. *See* N.Y. Civ. Serv. Law §3202.
3. 499 N.Y.S.2d 606 (N.Y. Sup.Ct. 1986)
4. No. 2665/87 (N.Y. Sup.Ct. mem. op. April 22, 1987).
5. 117 A.D. 198 (N.Y. App. Div. 1986).
6. *Matter of Fulton v. Krauskopf,* 127 Misc.2d 20 (N.Y. Sup.Ct.1984).

Center for Law and Education *NEWSNOTES*

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AROUND THE CENTER

Discipline Manual Update A supplement on the topic of "Search and Seizure" has been prepared, to update Section IV.B. of *School Discipline and Student Rights: An Advocate's Manual.* It includes an analysis of the U.S. Supreme Court decision in *New Jersey v. T.L.O.*, and other significant cases in this area that have been decided since the publication of the manual in 1982. The supplement also provides an update on the applicability of the exclusionary rule to school discipline cases. Copies of the 14-page supplement are available free to legal services programs and attorneys who provide free legal representation to LSC-eligible clients. Other persons may order it for $2.50, including postage and handling. Other sections of the manual are in the process of being updated.

Training Materials Available Copies of materials which have been compiled for training events conducted by the Center for Law and Education are available for distribution on request. The training packets can serve as reference guides on legal claims in respective areas, or as models for the development of materials for local, statewide or regional education law training sessions. Write to the Center's Cambridge office for a list of training materials and ordering information.

New Staff Members Lucy R. Watkins has joined the staff of the Center's Washington, D.C. office, as an Education Advocate. Her extensive experience in the field of youth employment and training at the local, state, regional, and national levels includes a stint as the Executive Director of Jobs for Youth-Boston, Inc. She has held a variety of policy and program development and consultant positions with such agencies as the Southern Regional Council, the Ford Foundation, the Commission on the Future of the South, and the North Carolina Fund, the first statewide anti-poverty program in the country. Lucy is currently focusing her attention on the federal Chapter 1 compensatory education program, vocational education, and the educational rights of homeless children.

Bonnie Wyneken has been hired to work in the Center's Cambridge office as a secretary and publications assistant. She has previous experience as a legal secretary, and has run her own free lance typing and editing service as well as a jewelry business.

Litigation Staff attorney Bob Pressman recently participated as co-counsel in the 24-day trial in *Ayers v. Allain*, a case contending that segregation and discrimination continue in Mississippi's system of higher education. The private plaintiffs in *Ayers* are represented by North Mississippi Rural Legal Services, which requested the Center's assistance in the case.

In late June, staff attorney Kathy Boundy submitted an *amicus curiae* brief to the United States Supreme Court in *Honig v. Doe*, a case which addresses the disciplinary exclusion of disruptive handicapped students from school. Participating as *amici* were Advocates for Children of New York, Inc., Disability Law Center, Inc., Massachusetts Advocacy Center, and the San Francisco Lawyers' Committee for Urban Affairs. The case will be argued in October, 1987.

Training Lucy Watkins attended two regional meetings of the National Coalition of Title I Chapter 1 Parents which were held in March, 1987. At the Region 5 (Midwest Region) meeting in Chicago, Lucy gave a presentation on the reauthorization of Chaper 1, and amendments that relate to improving parent involvement, quality of programs, and other aspects of the program. She also conducted two workshops on those topics at the Region 1 (Northeast Region) meeting in Hartford, Connecticut.

Special Education Advocates A group of forty experienced special education advocates from the New England area gathered in Cambridge on June 19th at a day-long meeting sponsored by the Center for Law and Education and the Disability Law Center. The agenda included sessions on the statutory duties of state education agencies and issues of shared responsibility for educational services, as well as updates on developments in the areas of attorneys' fees, early childhood education, and discipline issues. This was the second meeting of this discussion group, which plans to meet periodically on a regular basis. Center staff attorney Kathy Boundy is available to consult with special education advocates in other regions of the country who would like to organize similar groups.

Board Meeting The next meeting of the Center's Board of Directors will be held on Saturday, September 19, 1987 at 9:00 a.m. at the Center's Cambridge office.

Law Fellow Elissa Stein, recipient of a Harvard Law School Student Funded Fellowhip, is spending ten weeks at the Center this summer, working to update the 1982 manual *School Discipline and Student Rights*, as well as on other research and writing projects. Elissa is entering the final year of a four-year joint degree program at Harvard's Law School and John F. Kennedy School of Government.

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tion that large numbers of schools are refusing to accept homeless children.

"I don't know of any schools that have actually refused service," he said. "And I don't think that anybody has the data to support claims that this is a widespread practice."

But, said Ms. Foscarinis, the lobbyist for the homeless coalition, the problem may be more widespread than the education groups believe it is, based on the coalition's recent survey of officials in 81 emergency shelters across the country.

At 30 of the shelters, Ms. Foscarinis said, officials reported cases of "denial of access" by local school authorities. Because the survey results are still preliminary, she said, it is unclear exactly what such "denial" involves.

"But we know it means more than just a lack of effective outreach by the schools," she said. "It means an actual refusal to provide services of some sort."

The New York Supreme Court in Nassau County last year ruled in a case involving a family in Freeport, N.Y., that homeless children should attend school in whatever district they happen to be living in.

The family had been living in Freeport when they were evicted, according to Edward Luban, a lawyer for Nassau/Suffolk Law Services Committee Inc., which handled the case, *Delgado v. Freeport Free Union School District.*

When the family was sent to a temporary shelter in another school district, the Freeport schools refused to register its children, saying the family had lost its residency. The judge ruled in the district's favor.

In a similar case in the state last year, the commissioner of education ruled that children should attend the district they had been in before becoming homeless.

"The law defines your residence as something you keep until you establish a new one," Mr. Luban contended. "A temporary shelter by definition isn't a permanent residence."

The law firm has filed another suit on behalf of a homeless family in Freeport that has not been able to stay in one shelter for more than five weeks.

"It's an absurd situation," said Mr. Luban, the lawyer for that case, *Mason v. Freeport*. "We think it makes no sense to enroll children in a different school district day after day."

Activists say such suits are rare only because many families do not seek help. "Most of these parents aren't skilled enough to navigate the school system," said Helen Adams, director of the Salvation Army Youth Emergency Services in Birmingham, Ala., which operates a shelter for runaway, neglected, or abused youths.

Last fall, about 30 children at the Birmingham shelter were denied entrance to local schools after Birmingham and the surrounding Jefferson County cut two teaching positions from the shelter's in-house school, Ms. Adams said. That left the program with one teacher, who was qualified to teach only math and science.

"I begged the local schools to take the children, but they said they didn't have the money, and the children weren't legal residents of the district—which wasn't true," Ms. Adams said.

The dispute was resolved after Ms. Adams publicly threatened to close the shelter. But by the time the two school districts agreed to enroll the children or pay for the shelter's own school, some of the children had missed four months of English instruction.

Because children at the Birmingham shelter stay only a month or two, "it really is a bureaucratic mess for the schools," Ms. Adams conceded. "But if I hadn't gotten media attention, I don't think anything would have been done."

Sanctions Too Severe

Even if problems do exist in some districts, Mr. Hunter said, the sanctions called for in the proposed federal legislation are "like shooting a canary with a cannon."

"What is the point of denying services to all the children in a district because some children are not being served?" he asked.

Mr. Hunter and other education lobbyists, however, readily agreed that local education officials can and should do much more to find homeless children and bring them into the schools. State law, Mr. Hunter noted, requires no less.

"Every state has an absolute constitutional obligation to educate all children," he noted. "If one kid isn't being served, that's one too many."

But, he added, most districts have never mounted a coordinated effort to find and serve homeless children. "It's not the kind of thing anybody ever thought was necessary," he said.

Indicative of the problem faced by districts was a report released last month by California's Little Hoover Commission, charging that the state's $1.2-billion network of children's services is "in a state of utter confusion and disarray."

Many children who "desperately need help are not being served at all," the report concluded, blaming the "hodgepodge" of agencies that deal with children's problems.

As with the homelessness issue in general, a haze of uncertainty masks the scope of the problem faced by the education community, said Mike Edwards, lobbying director for the National Education Association, which also opposes the bills in Congress.

"Anecdotal evidence would indicate that there are a substantial number of children out there who are not being served, but we just don't know for sure," he said. "But that certainly does not mean we should wait until we have all the information before we do something."

While opposing the existing bills, education lobbyists said they would actively support efforts to increase additional federal support for outreach activities and for the kind of specialized support services that are needed to give homeless children a chance of academic success.

The House bill contains no additional funding. The Senate's version of the measure, however, would set aside $7.5 million over the next two years for research and demonstration projects.

'In a Bind'

For Mr. Hawkins, the California Democrat who heads the House Education and Labor Committee, the homeless-education bill has created an unpleasant dilemma.

Acting at the behest of the major education groups, he has blocked the House bill and apparently will seek to delete the Senate provision when members of the two chambers go to conference on the emergency aid bill later this month.

But Mr. Hawkins—a staunch advocate of both education and the homeless—is anything but comfortable with his role in the dispute, according to an aide.

"This really puts us in a bind," the aide said. "You end up with a situation where a member looks like he doesn't want to help homeless children, when actually he does."

According to Ms. Foscarinis, homeless advocates are willing to compromise on the legislation, even to the point of abandoning the sanctions entirely. Penalties, she said, "are not something we would refuse to part with."

"We would hope that if the education community sincerely wants to do something about this problem then we could work together to develop a bill that meets their objections," she added.

Education lobbyists also said they would be willing to support a revised homeless-education proposal. The original version of the Senate bill, which did not contain the objectionable sanctions, might be an acceptable alternative, some said.

Another possible approach to the problem, said Mr. Hunter of the administrators' association, would be to extend the existing migrant-education program to include the homeless. Migrant specialists, he noted, have developed a number of skills—in evaluating and tracking students, for example—that would also apply to the homeless.

"There is a certain amount of overlap already," Mr. Hunter said. "I think you need to work with these [homeless] kids essentially like you work with migrant kids."

Court Ruling Backs Teachers' Right To Strike

Teachers in Wilkes-Barre, Pa., have won back the right to hold selective strikes under a state appellate court's ruling.

The district had sought a court injunction to prevent the practice after members of the Wilkes-Barre Education Association, an affiliate of the National Education Association, held sporadic walkouts in November and December of 1984, during a contract dispute.

The strikes ranged from 10 minutes to one day, and resulted, in several cases, in the closing of schools.

The Commonwealth Court, in a 4-to-3 decision this month, ruled that intermittent walkouts by teachers do not jeopardize the health, safety, and welfare of the public.

The action overturned a decision by the Common Pleas Court of Luzerne County that had barred the practice since 1985.

The school board voted last week to appeal the decision, according to Leo Solomon, the district's superintendent of schools.

Mr. Solomon said that selective striking is not a "fair type" of strike because it results in children's being left unattended at their schools.

—A.P.

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Educators, Policymakers Tackle Special Problems of the Homeless

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that homeless children get the education they need to break the cycle of extreme poverty.

Elusive Statistics

Statistical data on the number of homeless children and adults are not widely available, but in the few locations where estimates have been made, the numbers vary dramatically.

In New York City, for example, officials estimate that 6,000 homeless children are living in shelters or welfare hotels, with up to 4,000 more receiving no assistance. In Los Angeles County, social-service advocates say that 9,000 families, with possibly twice that many children, are homeless. And in Washington, where city agencies do not count homeless children, the number of homeless adults is estimated at nearly 6,500.

Nationwide, the U.S. Department of Housing and Urban Development estimated in 1984 that 250,000 people were homeless; the National Coalition for the Homeless says that as many as 3 million may now be in that category.

Many of the homeless, Ms. Mihaly said, "are poor people who teetered over the edge."

"There are a surprising number of people who are close to becoming homeless," she added.

The HUD study also estimated that 25 percent of the homeless were families. This past winter, a survey of social-service agencies in 47 cities—conducted by Partnership for the Homeless, a private shelter network in New York City—found that families represent almost 35 percent of the homeless population.

According to Ellen L. Bassuk, a psychiatrist and author of one of the first studies of homeless families living in shelters, many are headed by single mothers. About 90 percent of the families she has studied in Massachusetts, she said, fit that description.

The statistical profiles emerging in such research have caused many professionals to question whether the resources at hand can break the emerging cycle of poverty, disrupted home life, and educational inadequacy.

"Homelessness may emerge as a transgenerational legacy," Dr. Bassuk said.

Mitch Snyder, an activist for the homeless in Washington, has claimed, along with other advocates, that the number of homeless families is actually higher than the estimates.

"They have a tendency to be invisible," Mr. Snyder said last week of homeless parents. "They hide, out of fear they will be declared unfit and have their children taken away."

Displaced Families

According to federal, state, and local officials, the growth in the number of displaced families is a consequence of several economic and social forces. For example, they note, the federal government has virtually ceased construction of low-income housing, and about half a million low-income apartment units are lost each year to condominium conversions, abandonment, arson, and demolition.

With the demand for apartments high—the vacancy rates in both Washington and Los Angeles are between 1 percent and 2 percent—"the housing market is small for people who are poor," said Eric Easter, a spokesman for the District of Columbia office of emergency shelter and support services.

In Washington, city officials reported a 500 percent increase this year in the number of homeless families who had sought housing in welfare hotels.

The city housing department has closed the waiting list for low-income housing, citing an 11-year wait for an apartment. The backlog, officials said, is causing the homeless to stay longer in so-called "temporary" shelters.

"We have a decrease in our ability to move people out," Mr. Easter said. Added Mr. Snyder, "The problem is going to get worse before it gets better."

Education Suffers

Noting that finding food and a place to sleep are keys to survival, "Mother" Charlessetta Waddles, the 75-year-old Detroit activist who opened her first soup kitchen in 1956, said that the education of their children is not typically a high priority for homeless families.

But even if it were, said Dr. Bassuk, an education is relatively inaccessible to many homeless children. "The shelters aren't hooked up to the educational system," she explained.

An associate professor of psychiatry at Harvard University, Dr. Bassuk's research involved 80 homeless mothers and 151 children living in 14 family shelters in Massachusetts.

"The children come into shelters with a history of failing school, and, rather than being helped, they get into a situation with fewer supports," she said.

About 43 percent of the children surveyed in her study had repeated a grade before coming to a shelter, Dr. Bassuk noted. Twenty-one percent were failing or performing below average, and 25 percent were in special classes.

She and her co-authors, Lenore Rubin and Alison S. Lauriat, also studied the children's level of emotional distress, using standard psychological tests.

About half of the children were found to have developmental lags, anxiety, and depression; a quarter required psychiatric treatment, they reported.

For example, one 3-month-old baby was "listless and unresponsive;" a 14-month-old baby was unable to crawl or make simple sounds; a 9-year-old boy talked openly about wanting to kill himself; and a 10-year-old boy pulled out three of his permanent teeth because he was worried.

The mothers in the researchers' studies were also found to be emotionally unstable, Dr. Bassuk said. One-third reported being abused in childhood; two-thirds had experienced a major family disruption; and, although 60 percent had completed high school, only a third had worked for longer than a month.

"The kids are ashamed and embarrassed about being homeless," Dr. Bassuk said. "They make up phone numbers to lie to school officials about where they live."

Children can hide their situations so well, Dr. Bassuk said, that "it sometimes doesn't enter into a teacher's head that the kid may be homeless."

Educators Respond

Though their efforts are in many cases only beginning, educators and social-service officials in a number of localities have recognized the special needs of such children and taken steps to address them.

In Washington, for example, city officials last month began sending 3- to 5-year-old children from one motel used as a makeshift shelter to Head Start classes. The 30 youngsters usually spend the remainder of the day watching television or going with their mothers to social-service offices, officials said.

The Head Start program frees the mothers to look for housing, the officials noted, and it gives the children more stimulation. Putting more children in Head Start or other day-care programs, Dr. Bassuk said, "would be wonderful," but there are few such programs available nationwide.

In Detroit, the Coalition on Temporary Shelter, which operates a 106-bed emergency shelter and an 88-room "single-room occupancy" hotel, sends children to a nearby day-care center. The number of homeless children has increased at the shelter 29 percent in the past year, said Jerrie Tent, the group's director.

Sometimes mothers delay signing children up for day care, she noted, because they "want to believe they won't be in the shelter more than a couple of days."

Three Schools in a Month

By far the biggest problem faced by homeless children is being sent to different schools as they move around, educators and social workers say.

"The kids go to three schools in 45 days," Ms. Tent said. "They leave their school, come to the emergency shelter and go to school downtown, then they find another place to live and go to schools there."

In most cities, advocates note, homeless families are rarely sent to shelters in their old neighborhoods, leaving parents with a difficult choice of allowing their children to travel long distances to their old schools, or enrolling them in new schools.

Some cities, such as Washington and Boston, provide transportation for children who choose to stay at the school they were attending before becoming homeless. But in other places, children must attend the school nearest the shelter—where they are often labeled "shelter kids."

The dislocation contributes to a high truancy rate among homeless youths. A recent survey by the Child Welfare League of America found that 43 percent of all school-age homeless children included in the study were not enrolled in school.

In New York City, representatives of the school board have begun visiting welfare hotels to check whether children are in school. "The city is making an effort," said Peter Smith, president of Partnership for the Homeless.

But in Washington, said Mr. Easter, "we feel it still remains a parent's responsibility to make sure their child is in school." His sentiment reflects the views of many state and local officials around the country.

□

Federal Legislation

The legislation introduced in the Congress would impose stiff penalties on states and local agencies found deficient in their efforts to help homeless children.

Advocates for the homeless contend that some school districts have used residency requirements to deny enrollment to children who cannot claim fixed addresses.

While fixed-address requirements have been eliminated for many federal and state programs, including those for food stamps, welfare, and health care, local school authorities still have considerable discretion in how they apply their residency rules.

"We've gone a long way toward solving that particular problem for homeless adults," said Maria Foscarinis, a lobbyist for the National Coalition for the Homeless. "Now we have to solve it for the kids."

A House bill sponsored by Representative Mickey Leland, Democrat of Texas, would deny all federal funding to any state that does not "ensure that each homeless child within the state is provided full and equal educational opportunities." Under a similar Senate proposal, states would lose only their share of funding under the Chapter 2 block grant.

Both bills would also require districts to conduct extensive outreach programs—sending counselors and social workers into the emergency shelters to locate school-age children, assess their educational needs, and arrange for transportation to and from school.

The Senate has included its proposal in a $450 million package of emergency aid for the homeless. But the House measure is still before the House Education and Labor Committee, and education lobbyists say they have a promise from Augustus Hawkins, the panel's chairman, to keep the bill pigeonholed there.

'Denial of Access'

Bruce Hunter, the chief lobbyist for the American Association of School Administrators, said the legislation is based on a false assump-

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Business Tax Revolt In Michigan Poses Threat to Schools

Top Firms Are Challenging Plants' Assessed Values

By Tom Mirga

Following the lead of the Ford Motor Company, a number of other Fortune 500 companies have challenged their tax assessments in Michigan in a move that could cost the state's school districts millions of dollars.

The list includes some of the most familiar names in American business: Amway, Chrysler Corporation, Dow Chemical, Du Pont, General Motors, Steelcase, Strohs, Uniroyal, Unisys, UpJohn, and Warner-Lambert. And their actions have prompted scores of smaller companies throughout the state to follow suit, observers say.

The Michigan Tax Information Council, a nonprofit research group, reports that more than 1,400 property-tax appeals had been filed with the state tax tribunal as of March 31. General Motors alone has filed nearly 30 such appeals, disputing a total of $460 million in property assessments in 14 communities.

According to school and business officials, the recession that ravaged the state's economy in the late 1970's and early 1980's,

'Shelter Kids'

Homeless Children Posing Special Problems For Educators, Policymakers, Social Workers

By Kirsten Goldberg and William Montague

At school, the other students call them "shelter kids."

They are the new homeless, moving with their parents from shelter to shelter and from school to school, sometimes missing classes for months at a time, sometimes dropping out altogether.

"The realization that there are large numbers of homeless children is a recent phenomenon," says Lisa K. Mihaly, a spokesman for the Children's Defense Fund, a Washington-based advocacy group. "The image of the homeless as being exclusively middle-aged bag ladies or skid-row bums is no longer valid."

Yet only recently have policymakers begun to address the complicated mixture of problems, including education, that homeless children face, according to advocates for the homeless.

And those who have undertaken the task say that the legal and ethical questions involved can be formidable. They include not only questions of jurisdictional responsibility and educational equity, but also, in some cases, the rights of homeless parents to keep their families intact.

Such questions may surface later this month in Congressional hearings, as federal lawmakers consider a proposed $450-million aid package for the homeless. Among the legislation's provisions is a requirement that state education agencies develop comprehensive plans for educating homeless children.

Though there is general agreement in the Congress that the problems of the homeless must be addressed, the measure is running into stiff opposition from major education groups, who say the proposals contain harsh sanctions that would do more harm than good.

Advocates for the homeless, on the other hand, have strongly endorsed the legislation, which, they say, would ensure

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'Dumping Ground' or Last Chance?

Broader Focus Said Key to Next Wave Of Reform Drive

New Study, Leaders Agree Public Must Be Won Over

By William Snider

CHICAGO—The school-reform movement has succeeded in raising student achievement in high school, but without more progress in professionalizing teaching and improving instruction in the early grades, such gains may be jeopardized by a return to "benign neglect," a major new study released last week concludes.

The book-length report, "*. . . the best of educations": Reforming America's Public Schools in the 1980's*, examines the reform process to date, concentrating on seven states: California, Colorado, Florida, Illinois, South Carolina, Texas, and Washington. It is the result of a two-year study commissioned by the John D. and Catherine T. MacArthur Foundation.

At a conference here coinciding with the report's release, a group of prominent educators and business leaders convened by the Education Commission of the States generally agreed with the report's conclusions on what the essential elements of the "second wave" of reform should be.

And they were in agreement with the

New York Times; Nov. 12, 1987 (page 1)

Thousands of Pupils Living in Hotels Skip School in New York

By JANE PERLEZ

Only half of the approximately 6,000 school-age homeless children living in hotels in New York City are known to be attending school, according to school officials.

The poor attendance, evident every day by the numbers of children roaming around the hotels in midtown Manhattan, is caused largely by confusion at the Board of Education about how to register and place the students, the officials said.

Dr. Gwendolyn C. Baker, one of the seven members of the board, termed the performance of its staff "disgraceful."

"This is November," she said. "We are probably lucky if we have half of the children going to school."

'No One Cares'

"There doesn't seem to be anyone on top of this," added Dr. Baker, the only black on the Board of Education. "These are poor black and Hispanic kids that no one cares about. It could be a wonderful program."

Jody Spiro, an executive assistant to Schools Chancellor Nathan Quinones, acknowledged that there was a "tremendous problem" with school attendance by the children, the majority of whom live in crowded rooms in rundown Manhattan hotels.

Ms. Spiro, who assumed responsibility for the program three weeks ago, said she had received attendance reports from the community school districts showing that 3,300 children from the hotels were attending school, al-

Continued on Page B5, Column 1

3,000 Children In Hotel Rooms Skipping School

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though not always regularly.

She said she had not received attendance records from local schools for 2,000 other children, who, she suspected, are having "severe attendance" problems. Seven hundred other schoolchildren have "fallen through the cracks," she said.

Hotel children who miss school are easy to find. In Manhattan at 7:15 A.M., outside the Martinique Hotel at 32d Street and Broadway, Tom Pellegrino, a school bus driver, said Tuesday that his assigned roster was 53 children. Most mornings 35 children ride with him, he said.

In the hotel last Thursday at midday, 15 school-age children romped around the lobby and first floor.

Bernard Mecklowitz, the Superintendent of Community School District 1 on the Lower East Side, said that of 850 hotel children he expected for this school year, 450 had enrolled so far.

In District 2, Andrew Lachman, the director of governmental and external relations, said "over 300" of 1,100 children expected had not registered. District 2, on the East Side of Manhattan, has the greatest concentration of hotel children, Mr. Lachman said.

Ms. Spiro attributed the poor school attendance to the abandonment by board officials, a week after school started in September, of a computerized plan to match Human Resources Administration records of the hotel children with their school records.

Breakdown on Several Levels

"It shouldn't have been scrapped," she said of the computerized system, which school district officials consider the most reliable way to keep track of the children as they move into hotels. "What I'm trying to do is to work with the H.R.A. to resurrect all of that."

Officials in the community school districts said the board's efforts to deal with the hotel children had broken down on several levels.

First, they said, the board relied on the managements of the hotels, rather than Human Resources Administration records, to tell board workers when families with school-age children move in and move out of the hotels.

"This is very catch as catch can," Mr. Lachman said.

Second, the officials said, the central board has not properly organized its family workers and attendance teachers to follow up on those children who register in schools but then, as often happens, drop out.

The Elusive Round-Up

At the Martinique Hotel, the largest center for hotel children, five family workers and two attendance teachers try to register the floating population of children and to follow up on their attendance. There are about 495 school-age children in the Martinique, according to David Strachan, the supervisor for the board's program there.

Julia McDaniel, who said she enjoyed working with the hotel children as a family worker, said she often felt scared traversing the upper reaches of the 15-floor hotel. She is assigned to cover three floors.

"Last week, it was pitch dark on my floors — all the lights had been broken," she said. "All over they're pushing dope, you name it."

At the Saratoga Hotel in Queens, Norma Rollins, executive director of Advocates for Children, a group that monitors the well-being of disadvantaged children in the public schools, said the Board of Education employee designated to ensure that hotel children went to school was found sitting in a locked hotel office last week while children romped in the lobby.

" 'I'm here if they want me,' was the reply when one of our people asked why she wasn't getting the kids to school," Ms. Rollins said.

Conduct Is a Problem

Another promise that board staff members have made but have not kept, according to district officials and Dr. Baker, calls for a paraprofessional to ride the school buses to maintain order.

Often, Mr. Mecklowitz said, the children's behavior is boisterous and dangerous to the safety of the bus. Buses with unsupervised hotel children have arrived at schools in the district with the back door open, he noted.

Dr. Baker said a supervisor on the buses was essential, not only for safety but also as a way of taking attendance.

"I was told last week by Joe Saccente that they would be on the buses by last Wednesday," Dr. Baker said, referring to the chief executive for operations at the board.

Uncertainty Over Bus Aides

Ms. Spiro said the paraprofessional would be on the buses next week.

Outside the Martinique Hotel Tuesday morning, the first paraprofessional to ride one of eight school buses there turned up for her first day of work. But Edwin Dannen, director of the Bureau of Attendance, said he did not know when the other paraprofessionals would arrive for the rest of the buses.

"I was told in two weeks," he said, "but I don't want to say anything, because it could be longer. There could be a union problem."

Besides problems like these, more than $1 million in state and Federal money allocated to District 2 for the hotel children has not been spent, according to Mr. Lachman. The district would like to use some of the money for attendance teachers, but the central board has said this would be improper use of the funds.

In addition, Mr. Lachman said, his district has not yet organized after-school programs for the hotel children, who are now bused back to their hotels immediately after classes.

"It's our fault," he said.

New York Times Editorial; Nov. 20, 1987

The Board of Education Plays Truant

School may be the only source of stability in the lives of New York City's homeless children. Yet the city's Board of Education has lost track of several hundred school-age children in emergency hotels and shelters. No one checks up on them to make sure they go to class. Children already "at risk" are thus put in further jeopardy. That's inexcusable.

Approximately 6,000 school-age children live in New York City hotels. Based on attendance records from 20 of the 32 community school districts, the central Board of Education estimates that 3,300 attend school. An additional 2,000 may turn up on school registers in the remaining 12 districts. But the central board admits that the remaining 700 have "fallen through the cracks."

That lapse represents another management failure for the Board of Education. Last March, Schools Chancellor Nathan Quinones issued reasonable regulations affirming that "continuity of instruction is of paramount importance" for homeless children. The regulations give parents the option of keeping their children in the school attended when the family lived in permanent housing or placing them in a school near the temporary residence.

Like so many other sensible projects initiated by the board, however, the rules for homeless children have not been properly put into effect. An ombudsman appointed to the central board to oversee the process left in frustration. Local community boards receive extra money to accommodate homeless children, and the city's Human Resources Administration keeps records on where children live. The central board has failed both to ride herd on the local boards and to coordinate effectively with the H.R.A.

Robert Wagner Jr., president of the board, shows his concern by visiting the hotels where many of the homeless children now reside. But the problem isn't with the hotels or the children; it's with the central board's headquarters, where an indifferent or incompetent bureaucracy cannot make sure that the city's neediest pupils go to school.

The New York Times

Metropolitan News

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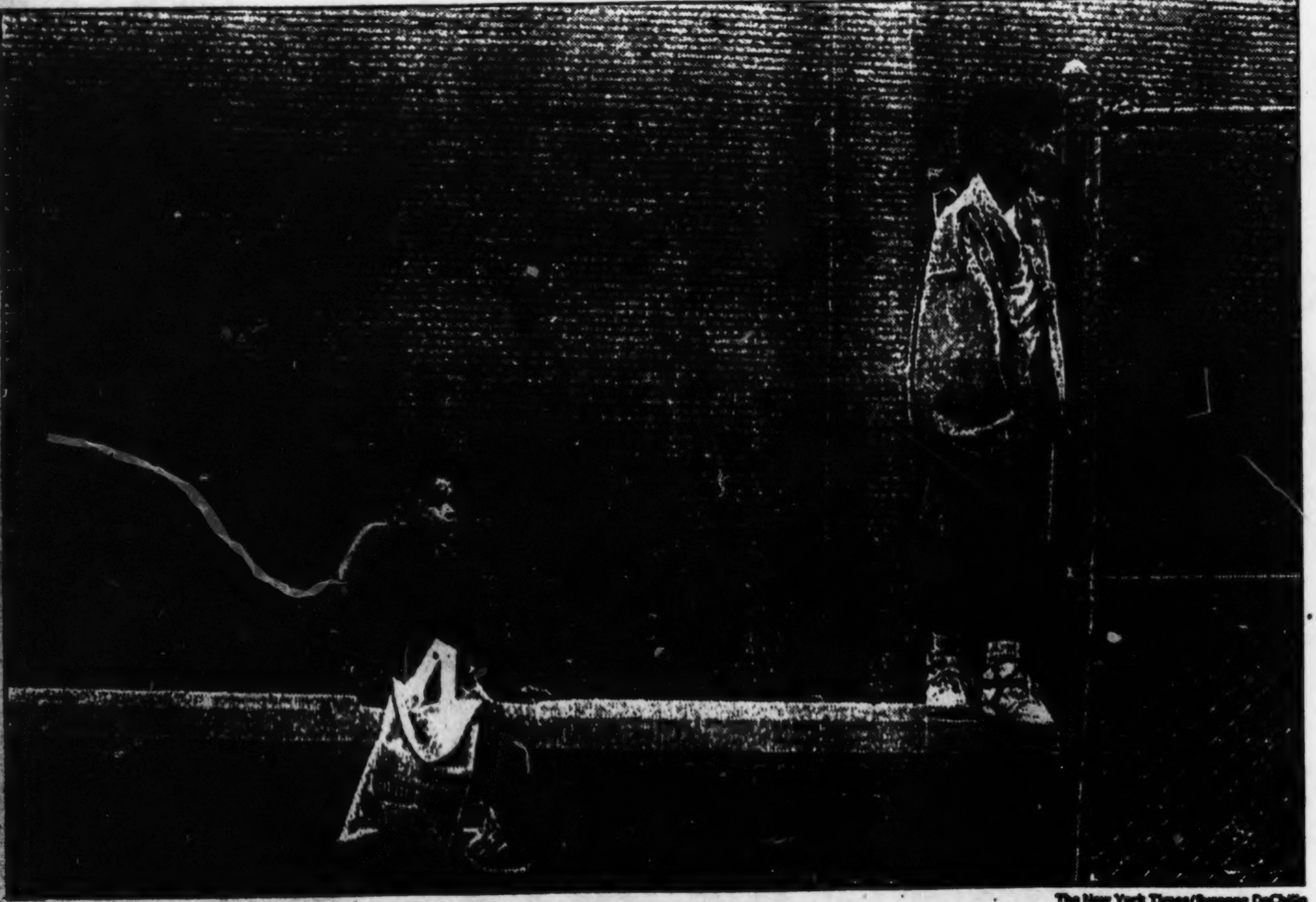

The New York Times/Suzanne DeChillo

Qiana Wirag and her brother, Lindsay, waiting at Oakside Elementary School in Peekskill, N.Y., for a taxi to take them to the motel in which they live in Mohegan Lake. The taxi was more than an hour late.

Ordeal for Homeless Students in Suburbs

By ERIC SCHMITT

Special to The New York Times

PEEKSKILL, N.Y. — While most of her classmates are still asleep, Tareebia Wakley is up at 6 A.M. each weekday to get ready for a 45-minute bus ride from a motel in Poughkeepsie to Oakside Elementary [illegible]ol here.

"[illegible] get tired," said Tareebia, who is 8 years old and for more than a year has commuted 35 miles each way from the Dorchester Motel to the neighborhood school that most of her classmates walk to.

School can be challenging enough for most children, but for those of homeless families in the suburbs, the added stress of long bus rides twice a day, homework in crowded motel rooms and no organized after-school activities is creating a class of listless and depressed pupils, educators say.

"It's no secret that these children are more prone to academic, physical and psychological problems because of the situations they're in," said Donald S. Rickett, Superintendent of Peekskill city schools.

Lack of Affordable Housing

The problems are particularly acute here in Westchester County, where about half of the 3,600 homeless people the county shelters are children, more than any other community in the metropolitan region outside of New York City.

In this working-class city on the Hudson River, for example, 60 of the school district's 2,800 children belong to homeless families who live in motels or hotels. Because of lack of space in the county, many families are forced to live in motels or hotels in Putnam, Dutchess and Orange Counties.

With rents starting at around $550 for a one-bedroom apartment and rising every year, and virtually no affordable housing available, the prospects of these Peekskill

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Homeless Students Face Long Roads to Schools

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families finding a permanent home here soon are slim.

The children, however, are still considered city residents and remain the responsibility of Peekskill schools. The county pays for buses and taxis to pick up the motel children around 7:15 A.M. and return them by 4 or 4:30 P.M.

Educators say they are doing what they can by providing free hot breakfasts, remedial help and psychological counseling. But the plight of the homeless, they contend, is a pervasive social problem whose remedies lie far beyond the schoolyard.

"It's a community problem," said Trudie Lee, a social worker at the Oakside school, which has 21 homeless children, more than any other school in the district. "If we don't help their parents, we can't help the children."

At first glance, educators, psychologists and social workers say, it is hard to distinguish the motel children from their peers.

"Sometimes they're a little more disorganized and their clothes are disheveled, but there's not one type," said James M. Tosto, a psychologist in the Peekskill schools.

Academically, the homeless children fall within the same range as other pupils — from exceptionally bright students who are enrolled in programs for the academically gifted to children who need counseling and remedial help.

But over the course of a school year, teachers and district officials said, the motel children are absent from school more frequently and are more likely to need special counseling and other academic assistance.

At Oakside, for example, the homeless children make up about 10 percent of the school population but account for 30 percent of the discipline and academic problems, Mr. Tosto said.

The children's problem, according to educators and social workers, begins at home, in the one or two rooms of a motel where often three or four children and one or both parents all live together.

The quality of the motels varies from the roomy Lakeview Cottages in Mohegan Lake, five miles east of here, which has its own security force, to others where drug sales and domestic fights are common, social workers said.

'Living in One Room'

"Some of these kids are in families living in one room, eating off a hot plate, with no real work space for homework," said Vincent S. Burruano, principal at Hillcrest Elementary School, which has 14 motel children.

The children are up early to ride buses or taxis to school. Children as young as 5 or 6 years old often arrive before 8 A.M. and leave as late as 4 P.M. depending on the schedules of older children who take the same bus or taxi.

"I don't like being the last ones to leave every day," said Qiana Wirag, a fifth-grader, who with her 5-year-old brother, Lindsey, waited until 4 P.M. today, an hour and 15 minutes after classes ended, before a taxi finally came to take them home to a motel in Mohegan Lake.

"Kids hate the stigma of riding the 'welfare taxis,'" Mr. Tosto said.

Transportation difficulties abound. Last year, for example, nearly 70 homeless children in the district missed school for two days while cab companies and the county argued over fare payments, according to James M. Zatlukal, Peekskill's deputy superintendent.

And if a child becomes ill, principals said, it can be a logistical nightmare to reach the parent at a motel, and then arrange with the county's Social Services Department for a taxi to take the child home.

Once at school, children with the longest rides are often fidgety in the morning and tired by early afternoon, teachers and principals said.

"Being a child should be a happy time, and for many of these kids not," Mr. Burruano said. "They d off in class and fall behind in their st ies. They can't participate in youth p grams like scouting because they h to take their buses home."

In a few cases, homeless childre greatest hurdle is finding a school trict that will take them. Recently

Federal District Court judge in White Plains ordered Peekskill to readmit Demi Harrison, 13, and her sister Sara, 10. The district had told them to leave by Nov. 2.

The sisters lived with their father in Peekskill until mid-October, when a dispute with the landlord forced them to move in with their mother in a motel in Mahopac, N.Y., 20 minutes away.

The Peekskill district said the girls were no longer the district's responsibility and told them to leave school by Nov. 2. Meantime, Mahopac schools said the girls were not their responsibility either because the motel was not considered a permanent residence.

Victims of a legal squeeze, the girls missed five school days until the court order allowed them back.

Educators and administrators here said the problems of the motel children are likely to worsen without permanent relief.

"If something's not done, I can foresee a higher dropout rate for these children," Mrs. Lee said.

Nonetheless, most principals and teachers hold out some hope.

"Some of these kids will make it in spite of the conditions they live in," said James B. Taylor, principal at Oakside. "They'll take the experience and consciously or subconsciously say, 'I'm not going to let this happen to me when I'm an adult.' They'll be the survivors."

The New York Times/Suzanne DeC

Kashia Wilson with her brother Rudy and sister Tai at Oakside Elementary School in Peekskill, N.Y. They and three siblings live with their mother in a four-room apartment at Lakeside Cottages, a ter porary homeless shelter in Mohegan Lake, N. Previously, they lived in a motel.

II. RELEVANT STATUTES AND REGULATIONS

A. Education Provisions of the Stewart B. McKinney Homelessness Assistance Act.

1. Text

PART B—EDUCATION FOR HOMELESS CHILDREN AND YOUTH

§ 11431. Statement of policy

It is the policy of the Congress that—

(1) each State educational agency shall assure that each child of a homeless individual and each homeless youth have access to a free, appropriate public education which would be provided to the children of a resident of a State and is consistent with the State school attendance laws; and

(2) in any State that has a residency requirement as a component of its compulsory school attendance laws, the State will review and undertake steps to revise such laws to assure that the children of homeless individuals and homeless youth are afforded a free and appropriate public education.

(Pub.L. 100-77, Title VII, § 721, July 22, 1987, 101 Stat. 525.)

Legislative History. For legislative history and purpose of Pub.L. 100-77, see 1987 U.S.Code Cong. and Adm.News, p. 362.

§ 11432. Grants for State activities for the education of homeless children and youth

(a) General authority

The Secretary of Education is, in accordance with the provisions of this section, authorized to make grants to States to carry out the activities described in subsections (c), (d), and (e) of this section.

(b) Allocation

From the amounts appropriated for each fiscal year pursuant to subsection (g) of this section, the Secretary shall allot to each State an amount which bears the same ratio to the amount appropriated in each such year as the amount allocated under section 111 of the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § 2711] (as incorporated by reference in chapter 1 of the Education Consolidation and Improvement Act of 1981 [20 U.S.C.A. § 3801 et seq.]) to the local educational agencies in the State in that year bears to the total amount allocated to such agencies in all States, except that no State shall receive less than $50,000 in any fiscal year.

(c) Authorized activities

Grants under this section shall be used—

(1) to carry out the policies set forth in section 11431 of this title in the State;

(2) to establish or designate an Office of Coordinator of Education of Homeless Childre and Youth in accordance with subsection (d) of this section; and

(3) to prepare and carry out the State plan described in subsection (e) of this section

(d) Functions of the Office of Coordinator

The Coordinator of Education of Homeless Children and Youth established in each State shall

(1) gather data on the number and location of homeless children and youth in the Stat and such data gathering shall include the nature and extent of problems of access to, a placement of, homeless children and homeless youth in elementary and secondary schoo and the difficulties in identifying the special needs of such children;

(2) develop and carry out the State plan described in subsection (e) of this section; a

(3) prepare and submit to the Secretary an interim report not later than December 1987, and a final report not later than December 31, 1988, on the data gathered pursuan paragraph (1).

To the extent that reliable current data is available in the State, each coordinator described in t subsection may use such data to fulfill the requirements of paragraph (1).

(e) State plan

(1) Each State shall adopt a plan to provide for the education of each homeless chil homeless youth within the State which will contain provisions designed to—

(A) authorize the State educational agency, the local educational agency, the paren guardian of the homeless child, the homeless youth, or the applicable social worker to the determinations required under this section; and

(B) provide procedures for the resolution of disputes regarding the educational plac of homeless children and youth.

(2) Each plan adopted under this subsection shall assure, to the extent practicable under requirements relating to education established by State law, that local educational agencies within the State will comply with the requirements of paragraphs (3) through (6).

(3) The local educational agency of each homeless child or youth shall either—

(A) continue the child's or youth's education in the school district of origin for the remainder of the school year; or

(B) enroll the child or youth in the school district where the child or youth is actually living;

whichever is in the child's best interest or the youth's best interest.

(4) The choice regarding placement shall be made regardless of whether the child or youth is living with the homeless parents or has been temporarily placed elsewhere by the parents.

(5) Each homeless child shall be provided services comparable to services offered to other students in the school selected according to the provisions of paragraph (3), including educational services for which the child meets the eligibility criteria, such as compensatory educational programs for the disadvantaged, and educational programs for the handicapped and for students with limited English proficiency; programs in vocational education; programs for the gifted and talented; and school meals programs.

(6) The school records of each homeless child or youth shall be maintained—

(A) so that the records are available, in a timely fashion, when a child or youth enters a new school district; and

(B) in a manner consistent with section 1232g of Title 20.

(f) Application

No State may receive a grant under this section unless the State educational agency submits an application to the Secretary at such time, in such manner, and containing or accompanied by such information as the Secretary may reasonably require.

(g) Authorization of appropriations

(1) There are authorized to be appropriated $5,000,000 for each of the fiscal years 1987 and 1988 to carry out the provisions of this section.

(2) Sums appropriated in each fiscal year shall remain available for the succeeding fiscal year.

(Pub.L. 100-77, Title VII, § 722, July 22, 1987, 101 Stat. 525.)

References in Text. The Education Consolidation and Improvement Act of 1981, referred to in subsec. (b) is subtitle D [§§ 551 to 596] of title V of Pub.L. 97-35, Aug. 13, 1981, 95 Stat. 463, as amended. Chapter 1 of the Act is classified generally to subchapter 1 [section 3801 et seq.] of chapter 51 of Title 20, Education. For complete classification of this Act to the Code, see Short Title note set out under section 3801 of Title 20 and Tables volume.

Legislative History. For legislative history and purpose of Pub.L. 100-77, see 1987 U.S.Code Cong. and Adm.News, p. 362.

§ 11433. Exemplary grants and dissemination of information activities authorized

(a) General authority

(1) The Secretary shall, from funds appropriated pursuant to subsection (f) of this section, make grants for exemplary programs that successfully address the needs of homeless students in elementary and secondary schools of the applicant.

(2) The Secretary shall, in accordance with subsection (e) of this section, conduct dissemination activities of exemplary programs designed to meet the educational needs of homeless elementary and secondary school students.

(b) Applicants

The Secretary shall make grants to State and local educational agencies for the purpose described in paragraph (1) of subsection (a) of this section.

(c) Eligibility for grants

No applicant may receive an exemplary grant under this section unless the applicant is located in a State which has submitted a State plan in accordance with the provisions of section 11432 of this title.

(d) Application

Each applicant which desires to receive a demonstration grant under this section shall submit an application to the Secretary at such time, in such manner, and containing or accompanied by such information as the Secretary may reasonably require. Each such application shall include—

(1) a description of the exemplary program for which assistance is sought;

(2) assurances that the applicant will transmit information with respect to the conduct of the program for which assistance is sought; and

(3) such additional assurances that the Secretary determines are necessary.

(e) Dissemination of information activities

The Secretary shall, from funds appropriated pursuant to subsection (f) of this section, conduct, directly or indirectly by way of grant, contract, or other arrangement, dissemination activities designed to inform State and local educational agencies of exemplary programs which successfully address the special needs of homeless students.

(f) Appropriations authorized

There is authorized to be appropriated $2,500,000 for fiscal year 1988 to carry out the provisions of this section.

(Pub.L. 100-77, Title VII, § 723, July 22, 1987, 101 Stat. 527.)

Legislative History. For legislative history and purpose of Pub.L. 100-77, see 1987 U.S.Code Cong. and Adm.News, p. 362.

§ 11434. National responsibilities

(a) General accounting office

The Comptroller General of the United States shall prepare and submit to the Congress not later than June 30, 1988, a report on the number of homeless children and youth in all States.

(b) Secretarial responsibilities

(1) The Secretary shall monitor and review compliance with the provisions of this part in accordance with the provisions of the General Education Provisions Act [20 U.S.C.A. § 1221 et seq.].

(2) The Secretary shall prepare and submit a report to the Congress on the programs and activities authorized by this part at the end of each fiscal year.

(3) The Secretary shall compile and submit a report to the Congress containing the information received from the States pursuant to section 11432(d)(3) of this title within 45 days of its receipt.

(Pub.L. 100-77, Title VII, § 724, July 22, 1987, 101 Stat. 528.)

References in Text. The General Education Provisions Act, referred to in subsec. (b)(1), is title IV of Pub.L. 90-247, Jan. 2, 1968, 81 Stat. 814, as amended, which is classified generally to chapter 31 (section 1221 et seq.) of Title 20, Education. For complete classification of this Act to the Code, see section 1221 of Title 20 and Table volume.

Legislative History. For legislative history and purpose of Pub.L. 100-77, see 1987 U.S.Code Cong. and Adm.News, p. 362.

§ 11435. Definitions

As used in this part—

(1) the term "Secretary" means the Secretary of Education; and

(2) the term "State" means each of the several States, the District of Columbia, and the Commonwealth of Puerto Rico.

(Pub.L. 100-77, Title VII, § 725, July 22, 1987, 101 Stat. 528.)

Legislative History. For legislative history and purpose of Pub.L. 100-77, see 1987 U.S.Code Cong. and Adm.News, p. 362.

PART C—JOB TRAINING FOR THE HOMELESS

§ 11441. Demonstration program authorized

(a) General authority

The Secretary of Labor shall, from funds appropriated pursuant to section 11449 of this title, make grants for the Federal share of job training demonstration projects for homeless individuals in accordance with the provisions of this part.

(b) Contract authority

The Secretary is authorized to enter into such contracts with State and local public agencies, private nonprofit organizations, private businesses, and other appropriate entities as may be necessary to carry out the provisions of this part.

(Pub.L. 100-77, Title VII, § 731, July 22, 1987, 101 Stat. 528.)

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improve literacy and basic skills remediation for homeless individuals.

SUBTITLE B—EDUCATION FOR HOMELESS CHILDREN AND YOUTH

The House recedes to the Senate amendment with modifications.

The Conferees have agreed on the following statement of explanation to Subtitle B:

The increasing number of homeless families with children and runaway and homeless youth is of great concern to the Committee of Conferees. Out of 29 cities surveyed by the U.S. Conference of Mayors, 17 reported that homeless children were denied access to education. As these families move in order to secure housing—often only temporary housing—children may shift from one school attendance area to another, or from one school district to another. Education is often disrupted which lowers student achievement, reduces attendance, and increases the risk that a student will drop out of school completely. Travelers Aid International and the Child Welfare League report that only 43% of school-age homeless children currently attend school.

Indications are that the problem is not improving. The U.S. Department of Housing and Urban Development estimated that 250,000 persons were homeless in 1984. Current estimates by the National Coalition for the Homeless are that as many as 3 million individuals may be homeless. Washington city officials reported a 500 percent increase in the number of homeless families seeking shelter just this year.

The purpose of this subtitle is to make plain the intent and policy of Congress that every child of a homeless family and each homeless youth be provided the same opportunities to receive free, appropriate educational services as children who are residents of the state. No child or youth should be denied access to any educational services simply because he or she is homeless. Of particular concern are potential disputes between school districts over the placement of these children, which could result in the homeless being denied an education in any school district.

To assist in carrying out this purpose, it is the intent of Congress that every state, upon receiving funds authorized for this purpose, designate or establish an office of Coordinator of Education of Homeless Children and Youth who will report to the State School Superintendent or to the Commissioner of the State Educational Agency. The Coordinator's responsibilities will include the development and implementation of a state plan regarding the education of homeless children and youth. This plan must provide for continuation of a homeless child's or youth's education in the school district of origin or the school district in which the child or youth is living, whichever is in the best interest of the child or youth. The plan must also contain a mechanism to resolve disputes which arise between and within local educational agencies regarding the responsibility for providing educational services to homeless children located therein in an expeditious and timely manner.

The plan shall assure that homeless children and youth have access to educational services comparable to those offered to other students in that particular school for which they are otherwise eligible, including compensatory educational programs for the disadvantaged; and educational programs for the handicapped and for students with limited English proficiency; vocational education programs; and gifted and talented programs. The Conferees intend that services such as school meals and transportation be provided at the same level and to the same degree as those offered to other students in that particular school. Access to these services shall not be compromised solely because a child or youth is homeless.

The plan shall assure that student records of a homeless child or youth are available in a timely fashion when that individual enters a new school district.

In addition, the Coordinator will be responsible for obtaining data on the number and location of homeless children and youth throughout the state, and identifying what the special needs are of this population, what difficulties arise in placement of these youngsters in school, and what is being done to resolve these difficulties. Reports containing this information are to be submitted to the Secretary of Education by December 31, 1987 and December 31, 1988. The Secretary, in turn, is to submit this information to the Congress within 30 days of its receipt.

This subtitle provides that the Secretary of Education shall prepare and submit to Congress a report on the programs and activities authorized by this subtitle at the end of each fiscal year. It is intended that this report encompass related activities conducted by all states, even if not all states participate in the program authorized herein. This report should include information about homeless children and youth who are not attending school, in order to provide the Congress with current information.

SUBTITLE C—JOB TRAINING FOR THE HOMELESS DEMONSTRATION PROJECT

The conference agreement accepted the Senate amendment to establish a job training demonstration project for the homeless. It also accepts the amendments to JTPA included in the House bill. Minor technical improvements were made to both of these provisions in conference.

Conference agreement

The conference agreement establishes a competitive grant program for job training demonstration projects. The Secretary may award contracts to State and local public agencies, private nonprofit organizations, private businesses, and other appropriate entities to carry out this Title. Grant applicants must provide, in addition to a description of their proposed job training activities, plans for obtaining referrals of homeless individuals to their project and care providers. Additionally, a grant applicant must describe plans to offer in-shelter outreach and assessment and pre-employment services where practicable, and other similar activities that will increase participation in their project. Performance standards must be identified and assurances must be given by the applicant that a preliminary project evaluation will be completed not later than the end of the first year of funding. Applicants must also provide as-

II. RELEVANT STATUTES AND REGULATIONS

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ferees, Chairman Brooks and Representative Collins of the House Government Operations Committee, and to the Chairman St Germain and Representative Gonzalez of the House Banking, Finance, and Urban Affairs Committee. I am proud to have been a part of this historic effort.

● Mr. CHILES. Mr. President, today we are considering final passage of the conference agreement for the Stewart B. McKinney Homeless Assistance Act. As a conferee on this bill, I wish to express my support for the conference agreement.

Not long ago, a young man spent three nights counting homeless people in Miami. He counted 1,300 on the streets and in emergency shelters. The Florida Department of Health and Human Services took an informal survey and concluded that at least 10,000 people are homeless on any given night in our State. In Tampa, about 700 people live on the streets and another 300 live in makeshift housing. This helps to explain why I support the conference agreement before us today.

While the homeless are a serious problem in Florida, they are also a national problem. A lot of the homeless are drug abusers. Perhaps as many as a quarter of them are mentally ill. And now, the most alarming thing is that we are seeing many families with children out on the street.

The Federal Government has taken some steps to help these people. Last year's antidrug bill included giving the homeless employment training and allowing the use of food stamps for meals at soup kitchens. The continuing resolution passed for 1987 contained new funding for emergency shelters and transitional housing. Earlier this year, in response to a particularly severe winter, Congress passed an emergency appropriation for the FEMA emergency food and shelter program.

But we need to do more. The conference agreement before us today is a step in the right direction. The authorizations in this bill pave the way to modify and expand programs to serve the housing, health, educational, job training, and nutritional needs of the homeless.

As chairman of the Budget Committee, I have to say that we will not be able to do everything we want. In these days of severe budget pressures, every dollar spent must be spent wisely and delivered efficiently. Since the inception of this legislation, I have been supportive of the general efforts of all the various committees' efforts in drafting a legislative response to this national problem. However, I have also spoken often of the tradeoffs necessary as we seek to craft a solution.

As you well know, Congress has just passed a budget resolution which sets a fiscal blueprint for 1988. Budget Committee staff constructed an analysis of the projected outcome of the supplemental appropriations-conference, specifically looking at the likely outcome of the homeless provisions.

This analysis indicated that the projected conference agreement, if carried forward to 1988 and fully funded, would exceed the budget resolution assumptions for homeless programs in 1988 by around $250 million in budget authority and $135 million in outlays. Broken out by appropriations subcommittees, this would mean that Labor-HHS would have to make up $82 million in 1988 budget authority and $75 million in 1988 outlays from other programs. HUD-Independent Agencies would have to find $166 million in 1988 budget authority and $60 million in 1988 outlays from other programs in their jurisdiction.

As is the case with every spending decision we make, there are tradeoffs. This is not to say that we should not seek to address the needs of the homeless. On the contrary, I believe we must.●

● Mr. KENNEDY. Mr. President, I am pleased to join my colleagues in supporting this legislation to bring emergency assistance and new hope to homeless Americans. Congress has worked hard from the beginning of this session to make this legislation a reality, and I congratulate the many Senators and Representatives who have contributed to it.

That so many Americans are homeless in the bicentennial of the founding of the United States is a national tragedy and a national disgrace. Almost 80 years ago, the White House Conference on Children declared that a "home life is the brightest and finest product of civilization."

Yet today, more Americans are homeless than at any time since the Great Depression. Estimates of the homeless population on an average night in 1984 ranged from 250,000 to as many as 3 million. There is no disagreement about two shocking facts: The number of Americans with no home is growing at an alarming rate, and families with young children are now joining the homeless in increasing numbers.

The U.S. Conference of Mayor's report, "The Continued Growth of Hunger, Homelessness, and Poverty in America's Cities: 1986," found that families represented an average of 28 percent of the homeless population and that the percentage was as high as 76 percent in some major metropolitan areas such as New York City. In addition, three quarters of the cities reported that families comprised the group for whom emergency shelter and other needed services are most glaringly absent. For example, in Boston, an average of 15 families per week become homeless. Although Massachusetts has increased its family shelter capacity by 400 percent over the last 2 years, 30 families per month are still turned away from shelters which are filled to capacity. These unfortunate families, having attempted the full range of personal, private, and public alternatives, are left defenseless, hopeless, and homeless.

Other segments of the homeless population face equally tragic circumstances. The chronically mentally ill, for example, are a significant share of the homeless population and perhaps the most mistreated group in our society. Ironically, a comprehensive system of community based care for the chronically mentally ill, which would include an appropriate place to live for every individual in this group, would cost no more than our current nonsystem of noncare. Alcohol and drug addicts have traditionally been an important segment of the homeless population; the cruel addictions which are contributing factors to their homelessness are particularly difficult to treat without the stability that a home environment provides.

The legislation we are considering today is no more than a beginning—but it is an important beginning. The Labor Committee segments of this Conference Report provide emergency services for homeless families to reduce the misery of homelessness—and they also establish service systems that can help to end homelessness and begin a decent life for important segments of the population.

The Labor Committee legislation provides health services to homeless individuals to assure that the pain of homelessness is not compounded by the pain of untreated illness. Fifty million dollars is allocated for grants to implement this section in fiscal year 1987 and $30 million in fiscal year 1988.

The chronically mentally ill have been estimated to constitute between 30 and 50 percent of all the homeless. The legislation establishes $35 million in formula grants to assist States in establishing comprehensive programs of community-based care for the homeless chronically mentally ill. The evidence is strong that such comprehensive programs can add to the quality of life of the chronically mentally ill and reduce homelessness that is largely a product of the failure to provide an adequate system of community care. Evidence is also strong that the system to be encouraged by this legislation is no more costly than the current system.

In addition to grants to States for this purpose, a $10 million program of project grants through the Federal Community Support Program demonstration is also established. The CSP has made an important contribution to our progress in caring for the chronically mentally ill, and this expanded grant program will establish a needed focus on the homeless.

Another group that accounts for a significant component of the homeless population is alcohol and drug addicts. Although the emergency drug bill increased funds for treatment of drug and alcohol abuse, the homeless segment of this population is one of the most costly to treat; it usually requires residential treatment facilities, and has rarely been a priority for state and local programs. The conference report provides a $10 million demonstration program for this purpose.

One of the most tragic and indefensible results of the growing number of homeless families has been the denial of public education to increasing numbers of children. Because, by definition, homeless children have no permanent residence, it has been easy for a school district to say that homeless children are someone else's responsibility. With no central body to assure that some district takes responsibility, homeless children end up without any educational opportunity. Traveler's Aid International recently conducted an eight-city survey, in which 43 percent of homeless children were not attending school. A survey of 31 shelters in 60 cities found that more than a third of the shelters housed homeless children who were denied access to the public education that should have been theirs by right. The conference report protects these children by enacting a grant program to establish coordinators in State education departments who will assure equal access to a free public school education. The coordinators will assure that every homeless child is assigned a school district, and that services including special programs and transportation are provided to homeless children, just as they are provided to other children.

This provision also prohibits States from enacting laws or engaging in practices which have the purpose or effect of discriminating against homeless children as a condition of funding. It also sets up a small demonstration program to assist school districts wishing to establish a model program of service to homeless children.

Many of the homeless are at a disadvantage in their search for employment and the income necessary to find permanent housing by the lack of basic education. Because they are hard to locate and serve, they have not been a priority for adult literacy programs. The legislation allows States to use Federal adult education funds for homeless people; it requires them to plan and implement a program of assistance and adult literacy for the homeless and provides a small formula grant program to assist States in providing these services.

Finally, this legislation establishes a demonstration program of employment services and training for the homeless. Several projects have indicated that a relatively modest investment can result in employment for homeless individuals. This modest investment can, in turn, allow homeless individuals to gain the income they need to find permanent housing. The [illegible] million Federal demonstration program provided by this legislation will result in employment for an estimated 20,000 individuals.

No group of Americans needs help more than the homeless. This legislation is a down payment on our commitment, and I urge its prompt enactment.

RELIEF FOR THE HOMELESS ACT

Mr. LEAHY. Mr. President, the nutrition provisions of the Urgent Relief for the Homeless Act are an important component of that comprehensive act designed to reduce homelessness in America.

Millions of Americans are now homeless or sharing temporary living quarters. The number of homeless families with children has rapidly increased. Families with children now comprise 28 percent of the homeless population. The U.S. Conference of Mayors recently reported that homelessness in American cities increased 20 percent last year.

The richest, most powerful Nation in the world should be able to house the homeless, feed the hungry, and care for the poor. I cannot accept the fact that the wealthiest Nation in the world, with the largest surplus food stocks of any nation in recorded history, cannot get this food out to those in need.

Title V of the conference bill, the "Nutrition" title, was reported out of the Agriculture Committee with full bipartisan support. It both reduces homelessness and provides food aid to those that are hungry and homeless.

Three provisions, sections 802, 806, and 809, are designed to reduce homelessness. Sections 807, 808, and 809 seek to get food stamps to hungry families that are already homeless.

Section 802 modifies the definition of food stamp household so that a brother can allow his sister and family to share his home and not have his family's food stamps reduced or terminated. Under the current act, unrelated individuals can live together yet separately apply for food stamps if they buy and prepare food separately. Related individuals with families, however, are often prevented from applying separately.

Current law does, of course, allow these relatives to receive separate food stamp allotments if they stop living together. However, the cruel realities of poverty force many families to move in together and to rely on one another for help with rent, bills, child care and the like. We should not punish these efforts to care for one's own relatives by reductions in food stamp benefits.

The conference bill would modify the definition of a food stamp household to remove the penalties that now exist for families doubling and tripling-up in housing units. The penalties in current law are limited to relatives. Under current law, unrelated people can live with each other and not worry about having their food stamps reduced or terminated by operation of the current household definition. This problem has been exacerbated by the Department's issuance of regulations that fail to take into account the traditional concept of living together, which is reflected in the statutory language.

The Nutrition Subcommittee heard convincing testimony that current rules are directly causing homelessness by inducing people with homes to throw out homeless relatives to keep from having the host family's food stamps cut.

A mayoral commission on homelessness in New York this spring reported that evictions by friends or relatives was an important cause of homelessness. The Commission found that current food stamp rules contributed to this problem by reducing or terminating the food stamps of relatives that double-up in living quarters. A nationwide survey just completed by the U.S. Conference of Mayors found that families with children were the single fastest growing segment of the homeless population. We, therefore, allow parents who have minor children to form separate households without regard to the parent-child or sibling rules. We would retain, of course, the current requirement that people must purchase and prepare food separately from others in order to be considered a separate food stamp household.

This change makes sense because it is commonly expected that parents will buy and cook meals separately with young children even if other relatives are also present. In this context, the committee's bill focuses on the presence of at least one minor child with the parent; the presence of the parent's other children would not prevent the family unit from being recognized as a separate household.

We make sure that these families remain eligible to participate as households by requiring that their status be reexamined at least once every 6 months. The committee expects that this reexamination will not burden the States since it should involve nothing more than a standard recertification, which for most such households comes up at least once every 6 months.

Section 806, a bipartisan proposal put forth on the floor by the Senators from Iowa [Mr. HARKIN] and Minnesota [Mr. BOSCHWITZ] would raise the limit on the excess shelter deduction that food stamp households may take. The excess shelter deduction is only available to households paying a very high proportion of their incomes—more than half of their adjusted incomes—for housing. The excess shelter cost deduction only applies to the extent that shelter expenses exceed 50 percent of net household income.

Low-income households that are paying so much more than this that they are at the excess shelter cap, currently set at $149, are obviously having trouble keeping up with their rent and utility bills while still feeding their families.

The current cap on the excess shelter deduction may force these families on the margin to choose between unfortunate people in our Nation have no food to eat and no hope of a job or education.

And it can't be that way without people of [illegible] and action. That is why we are naming [illegible] act after Stewart McKinney.

During initial consideration in the House on March 5, Stewart stood here in the well and asked us all what kind of America we wanted. Our answer will be in our votes today. I know he's watching now, so let's be doubly sure that we don't disappoint him. His legacy and his work deserve our support.

Mr. GALLO. Mr. Speaker, I support this legislation (H.R. 558) to provide much-needed help to those individuals who, for a variety of reasons, find themselves without a permanent place of residence.

Now that the conference committee has completed its work, we today have the opportunity to vote in favor of legislation that proposes a comprehensive solution to the problems of the homeless in America.

This critical authorization bill is based on a great deal of study not only of the causes of homelessness, but also of the actions we can take to give these individuals and their families the tools they need to break this cycle of pain and suffering.

The bill authorizes a major expansion of our efforts to provide emergency shelters where they are most needed through rehabilitation of existing buildings under the Department of Housing and Urban Development.

An important focus of this bill is that portion of the homeless population that includes mentally handicapped people and families with children. The need for permanent housing for [illegible] who are not only homeless, but also [illegible]less, is addressed in this bill.

[illegible] this special focus, we will be breaking the cycle of homelessness by providing for those who are unable to provide for themselves.

By the same token, this bill authorizes job training and education programs aimed at helping those individuals who are capable of helping themselves, with a little assistance and guidance along the way. Too many of our homeless are children, who could have a bright future based on their abilities, if they receive our help at this critical time in their lives.

Food and nutritional programs are also authorized by this bill and the Food Stamp Program has been adjusted to supplement current group feeding facilities with family-based food assistance.

Three critical health care needs—mental health services, special treatments for the chronically mentally ill, and drug and alcohol abuse treatments—have been authorized by this bill.

This bill emphasizes outreach to those with specific, identifiable needs within the homeless population, and deserves our support today.

Mrs. LLOYD. Mr. Speaker, I rise in strong support of the conference report on H.R. 558, the Stewart B. McKinney Homeless Assistance Act. This bill includes funding for a variety of programs to meet both the immediate and long-term needs of the homeless, such as emergency shelter and longer term housing, health care, food and nutrition assistance, [illegible]tion and job training, and child care. [illegible] funds are targeted to special population groups, including families with children, veterans, and the elderly.

One of the major factors in homelessness is the severe shortage of affordable housing for low-income individuals and families. The homeless prevention provisions in this conference agreement provide significant assistance to defray the high cost of housing and should be of tremendous assistance to those who desperately need affordable housing.

Adequate nutrition is another major problem of the homeless and one of the most effective ways to ensure that homeless and other low-income households receive prompt nutrition assistance is the Temporary Emergency Food Assistance Program [TEFAP]. This program has been a tremendous success in the State of Tennessee, particularly in my own third congressional district and deserves our continued support. This conference report extends TEFAP through September 30, 1988, ensuring the low-income Americans who depend on the surplus commodities distributed through TEFAP that the food they depend upon will not be taken away from them.

Mr. Speaker, I believe it is imperative that we in Congress take significant steps toward preventing future increases in the number of homeless Americans. This bill is a very important initiative in providing urgently needed assistance to the homeless and families in danger of becoming homeless. I believe this legislation is critically needed and should be swiftly enacted. I urge my colleagues to join with me in supporting its passage.

Mr. RANGEL. Mr. Speaker, I strongly support the conference agreement on the Stewart B. McKinney Homeless Assistance Act which authorizes $442.7 million in fiscal year 1987, and $616 million in fiscal year 1988, for homeless aid programs.

Sometimes we get caught up in the fervor of the intricacies of political policymaking, and we overlook some of our simpler, but no less important, responsibilities as public servants. It cannot be disputed that first and foremost, we have a responsibility to ensure that no American child is brought up in an environment without food, shelter, health care, and education.

According to a report released by the Conference of Mayors, the rate of homeless families with children in New York has increased by 20 percent in 1 year's time.

Providing a roof to live under is not enough. Oftentimes Federal owned buildings allotted for homeless shelters are quickly overtaken by drug dealers and other illegal and dangerous groups. Children are constantly moved from shelter to shelter in an effort to escape these dangers. Not only are these constant upheavals unsettling, but in many cases these children end up across town from the school that the law says they must attend. In New York, as in most cities, it is required that children attend the school that is closest to their last "permanent" address. But we all know that "permanent" housing is not a reality for the homeless.

While homeless children are the most disgraceful product of the current economic conditions of our country, they are by no means the only ones to suffer from this crisis. Senior citizens, the unemployed, the mentally ill and people seeking refuge from dangerous and abusive home conditions are also part of our growing homeless population.

In closing, I heartily approve of Homeless Assistance Act 558 as I would any movement toward reconciling the homeless crisis of our Nation. While this measure cures the symptoms, and not the cause of the problem—unemployment and lack of affordable housing constituting the major causes—it addresses the immediate problem at hand and establishes definite goals for future development.

Mr. WEISS. Mr. Speaker, I strongly support the pending conference report on H.R. 558, the Urgent Relief for the Homeless Act. Although the conference agreement provides less resources than the original House-passed version of the bill, the agreement will literally save the lives of homeless men, women and children who need our help. As the homeless emergency worsened each of the last few years, charitable organizations and local governments could not meet the urgent needs of the most destitute Americans. They pleaded for help from the Federal Government, and now we are responding. As a cosponsor of this bill, I am proud to be part of what will be the greatest and most needed congressional response to the homeless crisis, to date.

Many cities across the country have been forced to turn away homeless people in need of food and shelter because they lack sufficient beds and supplies. Shelters and soup kitchens with scant resources have strained to meet the needs of the homeless, and in too many cases, these facilities are unsanitary, unsafe and dehumanizing. All reports indicate that this past winter saw the largest numbers of homeless people since the Great Depression. The problem has not vanished with the change of seasons.

In reaction to the overwhelming needs of the homeless, and the inability of local private and public groups to adequately meet those needs, despite their best efforts, the leadership put together a bill that will put the 100th Congress on record as recognizing that America has a massive homeless problem that will not go away, and requires a nationally coordinated response.

The Human Resources and Intergovernmental Relations subcommittee, which I have the privilege to chair, has conducted a series of hearings on the Federal response to the homeless crisis, and the full Government Operations Committee has issued two reports which found the Federal response to be woefully inadequate.

The reports found that homelessness in America exists in epidemic proportions, and the homeless population is increasing by as much as 38 percent a year.

The reports found the major causes of homelessness to be the scarcity of affordable housing, deinstitutionalization of the mentally ill, unemployment and severe cuts in Federal housing and antipoverty programs. The factors leading to these causes are worsening. The Nation's low-income housing supply, particularly single room occupancy units, continues to dwindle. The hundreds of thousands of mentally ill Americans released from State mental institutions have found few alternatives to the streets. Deinstitutionalization of the mentally ill was initiated with the best of intentions more than 20 years ago, but the Federal Government never adequately supported the funding of community mental health centers to replace the archaic institutions that once imprisoned the mentally ill. The committee also reported that health problems and mental illness were rampant among the homeless.

to support the Polish nation's struggle to become free and independent.

All of us in this body acknowledge the numerous and diverse contributions made by Polish Americans. I am looking forward to sharing in the celebration of Polish American Heritage Month in October, 1987.●

THE STEWART B. McKINNEY HOMELESS ASSISTANCE ACT

● **Mr. MOYNIHAN.** Mr. President, on Saturday the Senate passed H.R. 558, the Stewart B. McKinney Homeless Assistance Act, by a vote of 65 to 8. As a conferee on H.R. 558, I believe that this conference agreement represents a compassionate, yet fiscally responsible attempt to address the needs of homeless individuals and families. For the past 6 months Congress has focused its attention on the many problems of homelessness. However, our work is certainly not done. We must remember that the report we adopted on Saturday will by no means cure the problem, but it is an essential first step in addressing the issue.

Any consideration of homelessness must recognize, first and foremost, that it is a terribly complex social problem. Its causes are many. Its victims knew no age, race, or ethnic bounds. And its problems are as diverse as its population.

When Congress first set out to write emergency homeless legislation, we had a dual objective: To provide immediate assistance to the homeless, in the form of shelter and emergency health care, and to learn more about the nature of the problem.

Some of these immediate needs were self-evident: food and nutritional assistance for the homeless, emergency—albeit inadequate—shelter, and acute health care. Other needs were less obvious. We understood less about these needs because their appearance marked a new trend: the rapid growth in the number of homeless families with children.

Homelessness, as we had known it in the past, was a condition confined largely to a population which society abandoned following deinstitutionalization. Only infrequently did we find whole families without housing. And when we did, it was mainly a temporary situation resulting from eviction or a wholly unanticipated crisis. In 1987, we see a radically different picture: Families with children now represent the fastest growing segment of the homeless population.

In and of itself, this trend is cause for great alarm. It is incumbent upon Congress and on this administration to examine why this is so. Have Federal policies over which we have control contributed to this turnabout? We know, for example, that cuts in Federal assistance for Low-Income Housing, Food Stamps, and Child Nutrition Programs are partially to blame. We know, as well, that urban development has left many of our Nation's cities with precious little low-income housing. Clearly, there are other contributing factors which deserve our immediate attention.

As if the life of homeless families weren't hard enough, the majority of them are living with a related problem: The children in such families, who have no permanent address, may also now lose their right to attend public school as a result of local rules that operate to deny public school education to children living in shelters or lacking a fixed address. In many cities across the Nation, for example, homeless children living inside a school district without a permanent address—in a family shelter or temporary welfare hotel—are not considered residents of that district, and are thus not entitled to attend that district's schools.

The Child Welfare League of America and the U.S. Conference of Mayors both report that many homeless school-age children do not regularly attend school. To address this serious problem, I offered a provision which has been included in this homeless assistance package. This measure is designed to guarantee access to elementary and secondary public education to all homeless children, regardless of the lack of a permanent or fixed address.

States must submit a plan to the Secretary of Education which addresses issues of education for homeless children. Grants will be made by the Federal Government on a formula basis to State and local educational agencies for exemplary programs. Upon receipt of Federal funding, States are required to designate a coordinator of education of homeless children and youth.

I would like to commend my colleagues Senators KENNEDY and STAFFORD and the other members of the conference committee for their assistance on this provision, and for their diligence on behalf of America's homeless youth.

As I said upon introduction, we would be foolhardy, indeed, to think that the measure we passed on Saturday will solve the tragedy of homelessness. At best, we can hope that the programs and funding authorized under this bill will provide emergency—and immediate—relief to many of those homeless individuals who desperately need a helping hand. But it is a step, one that has been to long delayed at the Federal level. I sincerely hope the President will act quickly to sign this important legislation, and will sign into law the supplemental appropriations measure—which contains some of this urgently needed funding—which will soon be sent to him.●

DEMOCRATIZATION OF THE REPUBLIC OF KOREA

● **Mr. McCONNELL.** Mr. President, on June 27, 1987, this body passed Senate Resolution 241, expressing its support for full democracy in the Republic of Korea. I think the fact that the vote was unanimous signifies our genuine concern for the stability and the future of South Korea, one of our strongest and closest allies.

During the Korean war, the United States lost 50,000 soldiers defending democratic principles. We currently have 40,000 troops there who are actively sustaining our commitment to democratic freedoms.

In spite of this commitment, and regardless of the history of our strong bond with the Korean people, the United States should not dictate policy to the Korean Government or its citizens. However, we can and should add our voice to the chorus that calls for democracy. In supporting democracy we recognise our obligations to the Americans that died there, the Americans that are serving there, and to the people of Korea.

Mr. President, I rise today to speak with optimism about the prospects for democracy in South Korea. Yesterday, South Korea's Democratic Justice Party chairman, Roh Tae Woo, said he thought the election laws should be changed to promote free campaigns. Mr. Roh also recommended the government make every effort to protect human rights, release political prisoners, and guarantee freedom of the press. As his party's designated successor to President Chun, this may be one of the most important developments in the Republic of Korea's historical quest for democracy.

Mr. Roh holds a pivotal position in the future of the Republic of Korea. I applaud his courage and understanding of the need for compromise. I hope that the opposition leaders share this vision and will support this stated commitment to finding a solution.

Mr. Roh's support for free elections, combined with President Chun's agreement last week to allow debate on constitutional change indicate the influence and resolve of the Korean people. I regret that it has taken violence in the streets to signal the need for change to the South Korean leadership, but I welcome the opportunity for meaningful dialog that may lead to democracy.

I approach these developments with caution, for although they represent a desirable change, they were conceived in an atmosphere of violence. The proof of the ruling party's intent will be in its implementation of these policies.

In the past three decades, South Korea has made great gains in industry, business, and finance. I am hopeful that the last 3 days of events in Korea mark the beginning of political development that will match the economic progress. The preservation of the economic stability achieved by those gains depends on a popularly elected government.●

II. RELEVANT STATUTES AND REGULATIONS

A. Education Provisions of the
Stewart B. McKinney Homelessness
Assistance act

4. Department of Education Materials
    a. Initial memo to states,
       list of state grant allocations

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE ASSISTANT SECRETARY
FOR ELEMENTARY AND SECONDARY EDUCATION

[illegible]

MEMORANDUM TO CHIEF STATE SCHOOL OFFICERS

SUBJECT: Stewart B. McKinney Homeless Assistance Act, Title VII-B

The Office of Elementary and Secondary Education is responsible for the administration of Title VII-B of the recently enacted Stewart B. McKinney Homeless Assistance Act. The Act authorizes the Secretary of Education to provide funds to States for the purpose of addressing the educational needs of homeless children and youth. As the Department begins to plan for this program, I am not only encouraging your participation, but am soliciting your input in the development of guidelines for its implementation.

The fiscal year (FY) 1987 supplemental appropriation includes $4.6 million for the Title VII-B program. According to the allocation provisions of Section 722(b) of the Homeless Assistance Act, the funds will be distributed to those States submitting the required applications to the Department of Education. Enclosed is an estimation of State allocations for FY 1987 under this program. No State will receive less than $50,000. States must use the funds to: (1) establish or designate an Office of Coordination of Education of Homeless Children and Youth; (2) develop and carry out a State plan for the education of homeless children and youth; and (3) carry out other activities to ensure that all homeless children and youth in the State have access to a free, appropriate public education. In addition, participating States must collect data on homeless children and youth and submit interim and final reports on that data to the Department of Education. A copy of the statute is enclosed for your information.

The Office of Elementary and Secondary Education is currently developing guidelines for the Title VII-B program, and devising an application form for participation in the program. We anticipate issuing nonregulatory guidelines in a format similar to that used with the Drug-Free Schools and Community Act of 1986.

The Homeless Assistance Act also authorizes the Department of Education to make discretionary grants in FY 1988 for exemplary programs addressing the needs of homeless elementary and secondary students and to disseminate information on these exemplary programs. While no funds are yet appropriated for this discretionary program, we do expect Congress to fund the program for the next fiscal year.

400 MARYLAND AVE., S.W. WASHINGTON, D.C. 20202

It would be very helpful if you could give us the name of a contact person for your State as soon as possible so that the Department may proceed in implementing this program. Please send the name of the contact person to: Mary Jean LeTendre, Director, Compensatory Education Programs, U.S. Department of Education, 400 Maryland Avenue, SW. (RM 2043, MS-6276), Washington D.C. 20202. Also forward any comments or questions concerning the program to the same address.

We strongly encourage each State, the District of Columbia, and Puerto Rico to participate in this program. The homeless children of our Nation desperately need our assistance to ensure that they receive a free public education.

Thank you for your attention, and we look forward to working with you on this project.

Beryl Dorsett

Beryl Dorsett
Assistant Secretary

Enclosures: Title VII-B, Homeless Assistance Act
State Allocation Table (Estimate)

cc: State Chapter 1 Coordinators

ESTIMATED 1987 ALLOCATION OF FUNDS APPROPRIATED FOR HOMELESS CHILDREN AND YOUTH

	1987 TOTAL CHAPTER 1 LEA GRANTS	FINAL DISTRIBUTION
UNITED STATES	$3,414,587,994	$4,600,000
ALABAMA	$69,979,432	$78,840
ALASKA	$5,575,105	$50,000
ARIZONA	$34,390,311	$50,000
ARKANSAS	$41,003,145	$50,000
CALIFORNIA	$328,900,805	$370,635
COLORADO	$32,549,408	$50,000
CONNECTICUT	$37,731,591	$50,000
DELAWARE	$9,927,070	$50,000
DIST. COLUMBIA	$15,475,830	$50,000
FLORIDA	$145,714,734	$164,165
GEORGIA	$92,033,065	$103,686
HAWAII	$10,550,433	$50,000
IDAHO	$9,932,077	$50,000
ILLINOIS	$160,259,570	$180,551
INDIANA	$53,484,252	$60,256
IOWA	$29,937,454	$50,000
KANSAS	$23,794,096	$50,000
KENTUCKY	$61,206,973	$68,957
LOUISIANA	$85,371,120	$96,180
MAINE	$15,231,892	$50,000
MARYLAND	$59,447,701	$66,975
MASSACHUSETTS	$79,384,341	$89,098
MICHIGAN	$134,616,894	$151,662
MINNESOTA	$42,299,819	$50,000
MISSISSIPPI	$64,700,722	$72,893
MISSOURI	$55,511,550	$62,540
MONTANA	$11,125,472	$50,000
NEBRASKA	$17,829,192	$50,000
NEVADA	$5,880,822	$50,000
NEW HAMPSHIRE	$8,145,018	$50,000
NEW JERSEY	$114,164,408	$128,619
NEW MEXICO	$27,057,777	$50,000
NEW YORK	$360,700,967	$406,371
NORTH CAROLINA	$81,753,427	$92,105
NORTH DAKOTA	$8,011,530	$50,000
OHIO	$124,756,042	$140,552
OKLAHOMA	$35,186,467	$50,000
OREGON	$29,395,753	$50,000
PENNSYLVANIA	$176,987,352	$199,397
RHODE ISLAND	$13,171,601	$50,000
SOUTH CAROLINA	$53,351,457	$60,107
SOUTH DAKOTA	$10,091,582	$50,000
TENNESSEE	$72,745,604	$81,956
TEXAS	$234,597,629	$264,302
UTAH	$11,794,375	$50,000
VERMONT	$7,637,091	$50,000
VIRGINIA	$66,643,072	$75,081
WASHINGTON	$44,298,615	$50,000
WEST VIRGINIA	$31,905,548	$50,000
WISCONSIN	$52,413,866	$59,050
WYOMING	$4,287,286	$50,000

II. RELEVANT STATUTES AND REGULATIONS

A. Education Provisions of the Stewart B. McKinney Homelessness Assistance act

4. Department of Education Materials
    b. Application for State Funding

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE ASSISTANT SECRETARY
FOR ELEMENTARY AND SECONDARY EDUCATION

November 24, 1987

MEMORANDUM TO CHIEF STATE SCHOOL OFFICERS

SUBJECT: Application for Funding for Education of Homeless Children and Youth

Enclosed is the application package for funding for the Education of Homeless Children and Youth portion of the Stewart B. McKinney Homeless Assistance Act. You will also find enclosed copies of the Nonregulatory Guidance, the statute, and the allocation chart.

The final date for receiving applications from States is April 30, 1988. After that date, the money allocated to States that choose not to participate will be reallocated to participating States. Applications will be processed and funded as they are received. We will not wait until after the deadline to do the funding.

Please return your completed application to:

U.S. Department of Education
Application Control Center
CFDA Number 84.196
400 Maryland Avenue, S.W.
Washington, D.C. 20202

If you have any questions, you may contact Carroll McKee, U.S. Department of Education, Office of Elementary and Secondary Education, Room 2004, 400 Maryland Avenue, S.W., Washington, D.C. 20202; (202) 732-5113.

Thank you for your interest in the Education of Homeless Children and Youth Program.

Beryl Dorsett

Beryl Dorsett
Assistant Secretary

Enclosure

cc: State Contact, Homeless Act

400 MARYLAND AVE., S.W. WASHINGTON, D.C. 20202

INSTRUCTIONS - General

PART I Form 424 - Instructions on the reverse side.

PART II Assurances - Self-explanatory

PART III Budget and Instructions

The original signed application and 2 copies shall be sent to:

Application Control Center
CFDA Number 84-196
400 Maryland Ave. S.W.
Washington, D.C. 20202

FEDERAL ASSISTANCE

1. TYPE OF SUBMISSION *(Mark appropriate box)*
☐ NOTICE OF INTENT (OPTIONAL)
☐ PREAPPLICATION
☐ APPLICATION

2. APPLICANT'S APPLICATION IDENTIFIER
a. NUMBER
b. DATE *Year month day* 19

3. STATE APPLICATION IDENTIFIER *NOTE: TO BE ASSIGNED BY STATE*
a. NUMBER
b. DATE ASSIGNED *Year month day* 19

Leave Blank

SECTION I—APPLICANT/RECIPIENT DATA

4. LEGAL APPLICANT/RECIPIENT
a. Applicant Name
b. Organization Unit
c. Street/P.O. Box
d. City
e. County
f. State
g. ZIP Code.
h. Contact Person *(Name & Telephone No.)*

5. EMPLOYER IDENTIFICATION NUMBER (EIN)

6. PROGRAM *(From CFDA)*
a. NUMBER ☐☐☐.☐☐☐
MULTIPLE ☐
b. TITLE

7. TITLE OF APPLICANT'S PROJECT (Use section IV of this form to provide a summary description of the project.)

8. TYPE OF APPLICANT/RECIPIENT
A—State
B—Interstate
C—Substate Organization
D—County
E—City
F—School District
G—Special Purpose District
H—Community Action Agency
I—Higher Educational Institution
J—Indian Tribe
K—Other (Specify):
Enter appropriate letter ☐

9. AREA OF PROJECT IMPACT *(Names of cities, counties, states, etc.)*

10. ESTIMATED NUMBER OF PERSONS BENEFITING

11. TYPE OF ASSISTANCE
A—Basic Grant
B—Supplemental Grant
C—Loan
D—Insurance
E—Other
Enter appropriate letter(s) ☐☐

12. PROPOSED FUNDING

a. FEDERAL	$	.00
b. APPLICANT		.00
c. STATE		.00
d. LOCAL		.00
e. OTHER		.00
f. Total	$	.00

13. CONGRESSIONAL DISTRICTS OF:
a. APPLICANT
b. PROJECT

14. TYPE OF APPLICATION
A—New
B—Renewal
C—Revision
D—Continuation
E—Augmentation
Enter appropriate letter ☐

15. PROJECT START DATE *Year month day* 19

16. PROJECT DURATION *Months*

17. TYPE OF CHANGE *(For 14c or 14e)*
A—Increase Dollars
B—Decrease Dollars
C—Increase Duration
D—Decrease Duration
E—Cancellation
F—Other (Specify):
Enter appropriate letter(s) ☐☐☐

18. DATE DUE TO FEDERAL AGENCY ▶ *Year month day* 19

19. FEDERAL AGENCY TO RECEIVE REQUEST
a. ORGANIZATIONAL UNIT (IF APPROPRIATE)
b. ADMINISTRATIVE CONTACT (IF KNOWN)
c. ADDRESS

20. EXISTING FEDERAL GRA IDENTIFICATION NUMBE

21. REMARKS ADDED
☐ Yes ☐ No

SECTION II—CERTIFICATION

22. THE APPLICANT CERTIFIES THAT▶

To the best of my knowledge and belief, data in this preapplication/application are true and correct, the document has been duly authorized by the governing body of the applicant and the applicant will comply with the attached assurances if the assistance is approved.

a. YES, THIS NOTICE OF INTENT/PREAPPLICATION/APPLICATION WAS MADE AVAILABLE TO THE STATE EXECUTIVE ORDER 12372 PROCESS FOR REVIEW ON:
DATE ______________________

b. NO, PROGRAM IS NOT COVERED BY E.O. 12372 ☐
OR PROGRAM HAS NOT BEEN SELECTED BY STATE FOR REVIEW ☐

23. CERTIFYING REPRESENTATIVE
a. TYPED NAME AND TITLE
b. SIGNATURE

SECTION III—FEDERAL AGENCY ACTION

24. APPLICATION RECEIVED *Year month day* 19

25. FEDERAL APPLICATION IDENTIFICATION NUMBER

26. FEDERAL GRANT IDENTIFICATION

27. ACTION TAKEN
☐ a. AWARDED
☐ b. REJECTED
☐ c. RETURNED FOR AMENDMENT
☐ d. RETURNED FOR E.O. 12372 SUBMISSION BY APPLICANT TO STATE
☐ e. DEFERRED
☐ f. WITHDRAWN

28. FUNDING

a. FEDERAL	$	.00
b. APPLICANT		.00
c. STATE		.00
d. LOCAL		.00
e. OTHER		.00
f. TOTAL	$	.00

29. ACTION DATE▶ *Year month day* 19

30. STARTING DATE *Year month* 19

31. CONTACT FOR ADDITIONAL INFORMATION *(Name and telephone number)*

32. ENDING DATE *Year month* 19

33. REMARKS ADDED
☐ Yes ☐ No

48

NSN 7540-01-008-8162

424-103

STANDARD FORM 424 PAGE 1 (Rev.

ASSURANCES

The Applicant hereby assures and certifies that it will comply with the regulations, policies, guidelines and requirements, as they relate to the application, acceptance and use of Federal funds for this federally-assisted project. Also the Applicant assures and certifies:

1. It possesses legal authority to apply for the grant; that a resolution, motion or similar action has been duly adopted or passed as an official act of the applicant's governing body, authorizing the filing of the application, including all understandings and assurances contained therein, and directing and authorizing the person identified as the official representative of the applicant to act in connection with the application and to provide such additional information as may be required.

2. It will comply with Title VI of the Civil Rights Act of 1964 (P.L. 88-352) and in accordance with Title VI of that Act, no person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which the applicant receives Federal financial assistance and will immediately take any measures necessary to effectuate this agreement.

3. It will comply with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) prohibiting employment discrimination where (1) the primary purpose of a grant is to provide employment or (2) discriminatory employment practices will result in unequal treatment of persons who are or should be benefiting from the grant-aided activity.

4. It will comply with Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794, which prohibits discrimination on the basis of handicap in programs and activities receiving Federal financial assistance.

5. It will comply with Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. 1681 *et seq.*, which prohibits discrimination on the basis of sex in education programs and activities receiving Federal financial assistance.

6. It will comply with the Age Discrimination Act of 1975, as amended, 42 U.S.C. 6101 *et seq.*, which prohibits discrimination on the basis of age in programs or activities receiving Federal financial assistance.

7. It will comply with requirements of the provisions of the Uniform Relocation Assistance and Real Property Acquisitions Act of 1970 (P.L. 91-646) which provides for fair and equitable treatment of persons displaced as a result of Federal and federally-assisted programs.

8. It will comply with the provisions of the Hatch Act which limit the political activity of employees.

9. It will comply with the minimum wage and maximum hours provisions of the Federal Fair Labor Standards Act, as they apply to hospital and educational institution employees of State and local governments.

10. It will establish safeguards to prohibit employees from using their positions for a purpose that is or gives the appearance of being motivated by a desire for private gain for themselves or others, particularly those with whom they have family, business, or other ties.

11. It will give the sponsoring agency or the Comptroller General through any authorized representative the access to and the right to examine all records, books, papers, or documents related to the grant.

12. It will comply with all requirements imposed by the Federal sponsoring agency concerning special requirements of law, program requirements, and other administrative requirements.

13. It will insure that the facilities under its ownership, lease or supervision which shall be utilized in the accomplishment of the project are not listed on the Environmental Protection Agency's (EPA) list of Violating Facilities and that it will notify the Federal grantor agency of the receipt of any communication from the Director of the EPA Office of Federal Activities indicating that a facility to be used in the project is under consideration for listing by the EPA.

14. It will comply with the flood insurance purchase requirements of Section 102(a) of the Flood Disaster Protection Act of 1973, P.L. 93-234, 87 Stat. 975, approved December 31, 1976. Section 102(a) requires, on or after March 2, 1975, the purchase of flood insurance in communities where such insurance is available as a condition for the receipt of any Federal financial assistance for construction or acquisition purposes for use in any area that has been identified by the Secretary of the Department of Housing and Urban Development as an area having special flood hazards. The phrase "Federal financial assistance" includes any form of loan, grant, guaranty, insurance payment, rebate, subsidy, disaster assistance loan or grant, or any other form of direct or indirect Federal assistance.

15. It will assist the Federal grantor agency in its compliance with Section 106 of the National Historic Preservation Act of 1966 as amended (16 U.S.C. 470), Executive Order 11593, and the Archeological and Historic Preservation Act of 1966 (16 U.S.C. 469a-1 *et seq.*) by (a) consulting with the State Historic Preservation Officer on the conduct of investigations, as necessary, to identify properties listed in or eligible for inclusion in the National Register of Historic Places that are subject to adverse effects (see 36 CFR Part 800.8) by the activity, and notifying the Federal grantor agency of the existence of any such properties, and by (b) complying with all requirements established by the Federal grantor agency to avoid or mitigate adverse effects upon such properties.

The following are additional assurances from the Statute and General Education Provision Act (GEPA).

STATUTE:

1. The application is the basis for State operation and administration of the program.

2. The State will use the grant funds in accordance with the requirements of the Act.

3. Each child of a homeless individual and each homeless youth will have access to a free, appropriate public education which would be provided to the children of the residents of the State and is consistent with the State school attendance laws.

4. In any State that has a residency requirement as a component of its compulsory school attendance laws, the State will review and undertake steps to revise such laws to assure that the children of homeless individuals and homeless youth are offered a free and appropriate public education.

5. The State will establish or designate an Office of Coordinator of Education of Homeless Children and Youth to carry out the functions as described in Section 722(d) of the Act.

6. The State will develop, submit to the Secretary, and carry out a State plan as described in Section 722(e) of the Act.

7. The State will gather data on the number and location of homeless children and youth in the State. Such data gathering will also include information on the nature and extent of problems of access to, and placement of, homeless children and homeless youth in elementary and secondary schools, and the difficulties in identifying the special needs of such children.

8. The State will prepare and submit to the Secretary an interim and final report on data gathered in paragraph (7) above.

GEPA

1. The State will administer the program in accordance with all applicable statutes, regulations, the State plan and the application.

2. The State will control the funds provided under this program, and title to property acquired with these funds will be in a public agency.

3. The State will adopt and use proper methods of administering the program including the following:

   (a) The State will monitor agencies responsible for carrying out the program and enforce any obligations imposed on those agencies under the law;

   (b) The State will provide technical assistance, if necessary, to those agencies;

   (c) The State will encourage the adoption of promising or innovative education techniques by those agencies;

   (d) The State will disseminate throughout the State information on program requirements and successful practices; and

   (e) The State will correct deficiencies in program operations that are identified through monitoring or evaluation.

4. The State will evaluate the effectiveness of covered programs in meeting their statutory objectives,at such intervals (not less often than once every three years) and in accordance with such procedures as the Commissioner may prescribe by regulation, and that the State will cooperate in carrying out any evaluation of each program conducted by or for the Secretary or other Federal official.

5. The State will use fiscal control and funds accounting procedures that will ensure proper disbursements of, and accounting for, Federal funds paid to the State under this program.

6. The State will provide reasonable opportunities for the participation by local agencies, representatives of the class of individuals affected by this program, and other interested institutions, organizations,and individuals in the planning for and operation of the program, including the following:

   (a) The State will consult with relevant advisory committees, local agencies, interest groups, and experienced professionals in the development of the State's plan.

(b) The State will publish the proposed State plan, in a manner that will ensure circulation throughout the State, at least 60 days prior to the date on which the plan becomes effective, whichever occurs earlier, with an opportunity for public comments on the plan to be accepted for at least 30 days.

(c) The State will hold public hearings on the proposed State plan.

(d) The State will provide an opportunity for interested agencies, organizations and individuals to suggest improvements in the administration of the program and to allege that there has been a failure to comply with applicable statutes and regulations.

7. The State will not use funds to acquire equipment (including computer software) in any instance in which such acquisition results in a direct financial benefit to any organization representing the interests of the purchasing entity or its employees or any affiliate of such an organization.

8. The State will maintain records - including records required under Section 437 of GEPA - and provide access to those records as the Secretary decides is necessary to perform his or her duties.

The Chief Executive Officer of the State assures that:

> The funds made available under Section 722 of the Act shall be used in accordance with the requirements of the Act, all applicable statutes and regulations, the State plan, and the assurances set forth in this application.

Chief Executive Officer	Date

The state educational agency also assures that:

> The funds made available under Section 722 of the Act shall be used in accordance with the requirements of the Act, all applicable statutes and regulations, the State plan, and the assurance set forth in this application.

For the State Educational Agency Signature and Title	Date

PART III - INSTRUCTIONS

1. Salaries and Wages: Show salary and wages to be paid to personnel employed in the project. Fees and expenses for consultants must be included in line 6.

2. Fringe Benefits: Include contributions for Social Security, employee insurance, pension plans, etc. Leave blank if fringe benefits applicable to direct salaries and wages are treated as part of the indirect cost rate.

3. Travel: Indicate the amount requested for travel of employees.

4. Equipment: Indicate the cost of nonexpendable personnel property which has a useful life of more than two years and an acquisition cost of $500 or more per unit.

5. Supplies: Include the cost of consumable supplies and materials to be used in the project. These should be items which cost less than $500 per unit with a useful life of less than two years.

6. Contractual Services: Show the amount to be used for (1) procurement contracts (except those which belong on other lines such as supplies and equipment listed above); and (2) sub-grants or payments for consultants and secondary recipient organizations such as affiliates, cooperating institutions, delegate agencies, etc.

7. Other: Indicate all direct costs not clearly covered by lines 1-6 above.

8. Total Direct Costs: Show totals for lines 1-7.

9. Total Indirect Costs: Indicate the amount of indirect costs to be charged to the program or project. Explain under budget narrative the indirect cost rate and base.

10. Total Project Costs: Total lines 8 and 9.

PART III - BUDGET INFORMATION
FY _____

Section A - Detailed Budget by Categories

Salary and Wages	$
Fringe Benefits	
Travel	
Equipment	
Supplies	
Contractual Services	
Other (itemize)	
Total Direct Costs (lines 1 to 7 totaled)	
Total Indirect Costs	
Total Project Costs (lines 8 + 9)	

An application for an award must be mailed or hand delivered by the application transmittal deadline (closing date).

Applications Delivered by Mail

An application sent by mail must be addressed to the U.S. Department of Education, Application Control Center, Attention: CFDA Number, 400 Maryland Avenue, SW., Washington, D.C. 20202

An application must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service Postmark.
(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.
(3) A dated shipping label, invoice, or receipt from a commercial carrier.
(4) Any other proof of mailing acceptable to the U.S. Secretary of Education.

If an application is sent through the U.S. Postal Service, the Secretary does not accept either of the following as proof of mailing:

(1) A private metered postmark, or
(2) A mail receipt that is not dated by the U.S. Postal Service.

An applicant should note that the U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, an applicant should check with its local post office.

An applicant is encouraged to use registered or at least first class mail.

Each late applicant will be notified that its application will not be considered.

Applications Delivered by Hand

An application that is hand delivered must be taken to the U.S. Department of Education, Application Control Center, Room 3633, Regional Office Building 3, 7th and D Streets, SW., Washington, D.C.

The Application Control Center will accept hand delivered applications between 8:00 a.m. and 4:30 p.m. (Washington D.C. time) daily, except Saturdays, Sundays, and Federal holidays.

Applications Delivered by Courier Service

An application that is delivered by a Courier Service should be addressed to U.S. Department of Education, Application Control Center, Room 3633, Regional Office Building 3, 7th and D Street, SW., Washington, D.C.

The Application Control Center will accept deliveries between 8:00 a.m. and 4:30 p.m. (Washington, D.C. time) daily, except Saturdays, Sundays and Federal holidays.

In order for an application sent through a Courier Service to be considered timely, the Courier Service must be in receipt of the application on or before the application transmittal deadline.

II. RELEVANT STATUTES AND REGULATIONS

A. Education Provisions of the Stewart B. McKinney Homelessness Assistance act

4. Department of Education Materials

c. Non-regulatory Guidelines for States

NONREGULATORY GUIDANCE

To assist State Educational Agencies in
Administering State Activities Designed to
Meet the Special Educational Needs of
Homeless Children and Youth under

TITLE VII, SUBTITLE B OF THE
STEWART B. MCKINNEY HOMELESS
ASSISTANCE ACT, PUBLIC LAW 100-77

U.S. DEPARTMENT OF EDUCATION

November 1987

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A. INTRODUCTION

Title VII, Subtitle B, of the Stewart B. McKinney Homeless Assistance Act - Education of Homeless Children and Youth

Title VII-B of the Stewart B. McKinney Homeless Assistance Act (the Act) provides State educational agencies (SEAs) with grant funds to carry out policies to ensure that homeless children and youth have access to a free, appropriate public education which would be provided to children of residents of the State and is consistent with State attendance laws. The basic standard is that homeless individuals should have the same access to elementary and secondary education as children whose parents are fully established residents of the State. If a State has residency requirements as components of its compulsory school attendance laws, it should review and undertake steps to revise those laws to ensure that children of homeless individuals and homeless youth are afforded a free and appropriate public education. State residency requirements should not pose any barriers to the education of homeless individuals.

B. PURPOSE OF THIS NONREGULATORY GUIDANCE

This nonregulatory guidance highlights some important aspects of Title VII-B of the Stewart B. McKinney Homeless Assistance Act.

Title VII-B includes authorization for two grant programs:

(1) A program of grants for State activities for the education of homeless children and youth (Section 722); and

(2) A program of exemplary grants and dissemination of information for States who have participated in the basic grant program (Section 723).

This guidance applies to the State activities program described in Section 722 of the Act, and may be relied upon by States in administering this program. The guidance does not impose any requirements beyond those imposed by the Act, the General Education Provisions Act (GEPA), and the Education Department General Administrative Regulations (EDGAR). If a State follows this guidance, the U.S. Department of Education--including its Inspector General--considers the State to be in compliance with the Act concerning matters covered by the guidance. Information on grants to be made under Section 723 will be issued separately; currently no funds are available for this program. However, only educational agencies located in States that participated in the State activities program will be eligible for Section 723 grants, should they become available.

C. DEFINITIONS

Question C.1.:	What is meant by the terms "child" and "youth"?
Answer:	For purposes of this section, "child" and "youth" includes those persons who, were they children of residents of the State, would be entitled to a free public education.

Question C.2.: What is meant by the term "homeless"?

Answer: A homeless individual is one who (1) lacks a fixed, regular, and adequate residence or (2) has a primary nighttime residence in a supervised publicly or privately operated shelter for temporary accommodations (including welfare hotels, congregate shelters, and transitional housing for the mentally ill), an institution providing temporary residence for individuals intended to be institutionalized, or a public or private place not designated for, or ordinarily used as, a regular sleeping accommodation for human beings (Section 103 (a)(1)(2) of the Act).

The term "homeless" or "homeless individual" does not include any individual imprisoned or otherwise detained by an Act of Congress or a State law (Section 103(c)).

Question C.3.: What is a "free, appropriate public education"?

Answer: A free, appropriate public education means the educational programs and services that are provided the children of a resident of a State, and that are consistent with State school attendance laws (Section 721(1)). It includes educational services for which the child meets the eligibility criteria, such as compensatory education programs for the disadvantaged, and educational programs for the handicapped and for students with limited English proficiency; programs in vocational education, programs for the gifted and talented; and school meals programs (Section 722(e)(5)).

D. ASSISTANCE UNDER TITLE VII, SUBTITLE B, SECTION 722

Question D.1.: Who is eligible to apply for Section 722 funds?

Answer: The SEAs of the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico are eligible to apply for a grant under Section 722.

Question D.2.: For what activities must the grant funds be used?

Answer: Funds provided under Section 722 of the Act must be used:

(1) To carry out the policies in Section 721 of the Act. That is:

(a) Each SEA shall ensure that each child of a homeless individual and each homeless youth have access to a free, appropriate public education which would be provided to the children of a resident of a State and is consistent with the State school attendance laws; and

(b) In any State that has a residency requirement as a component of its compulsory school attendance laws, the State will review and undertake steps to revise such laws to ensure that the children of homeless individuals and homeless youth are afforded a free and appropriate public education.

(2) To establish or designate an Office of Coordinator of Education of Homeless Children and Youth; and

(3) To prepare and carry out a State plan to provide for education of homeless children and youth.

The funds may not be used, however, to pay the actual costs of educating homeless children and youth.

Question D.3.: How much assistance is now available for States under this provision?

Answer: $4.6 million has been appropriated for use in fiscal year 1988. These funds remain available for obligation through September 30, 1989 by application of the Tydings Amendement (20 USC §1225 (b)). Congress has not yet completed action on the appropriation that would make funds available for use in fiscal year 1989.

Question D.4.: How will Section 722 grant funds be allocated among the States?

Answer: The distribution of funds to participating States is based on proportion each State's basic grant is the total basic grant funds under Chapter 1 of the Education Consolidation and Improvement Act of 1981, except that no participating State will receive less than $50,000 in any given year. Each year, the Department will provide to the States a schedule detailing the amount each State will receive if all States participate in the program.

Question D.5.: Will the Department reallocate excess funds if some States choose not to participate in the program?

Answer: Yes. All excess funds, i.e., funds that are not requested by other States, will be reallocated to participating States according to the formula used in making the original allocations. However, States that received a minimum allocation in the initial distribution will not receive additional funds unless the initial formula distribution, plus the reallocated amount, exceeds $50,000 (Section 722(b)).

Question D.6.: For what time period should States seek assistance in their applications?

Answer: In their initial applications, States should request assistance for the 12-month period following the date of the application. In a subsequent application for a continuation award, States should request assistance for the next 12-month period.

Question D.7.: In addition to the provisions of Title VII, Subtitle B, of the Act, do any Federal statutes and regulations govern the administration of this program?

Answer: Yes. The program must be administered in accordance with GEPA and the EDGAR requirements in Title 34 of the Code of Federal Regulations, Part 74 (Administration of Grants), Part 76 (State-Administered Programs), Part 77 (Definitions that Apply to Department Regulations), and Part 78 (Education Appeal Board).

Question D.8.: When may States apply for a grant?

Answer: States may apply for an initial grant after receiving an application package from the Secretary. The package will include an application form, a copy of the Act, and this nonregulatory guidance.

To be assured of consideration for a grant, States should submit their applications by April 30 of each year. Applications for the initial year of support should be submitted by April 30, 1988. Each application will be processed as it is received. Grants will be awarded to the States after their applications are approved.

Question D.9.: Must the application for a grant include a State plan?

Answer: The initial application need not include a State plan, since one purpose of the initial grant is to have States develop a plan that meets the requirements of Section 722(e).

Applications for continuation awards, however, must include the plan as evidence of the State's progress in meeting the purposes of the Act.

Question D.10.: What information must States provide in their applications?

Answer: The information that States must provide in their applications will be specified on the application form. It includes, among other things, assurances that the States will use the funds in accordance with the requirements of the Act and will maintain the records necessary for fiscal control and fund accountability. An application for a continuation award must also include a State plan that meets the requirements of Section 722(e) of the Act.

E. ASSURANCES AND RESPONSIBILITIES OF STATE AND LOCAL EDUCATIONAL AGENCIES

Question E.1.: What are the responsibilities of the participating SEAs?

Answer: SEAs receiving Section 722 funds must:

(1) Assure that homeless children and youth have access to a free, appropriate public education which would be provided to children of residents of the State and is consistent with State school attendance laws.

(2) Review and undertake steps to revise residency requirements that may be part of the State's compulsory education laws so that homeless individuals have access to a free and appropriate public education.

(3) Establish or designate an Office of Coordinator of Education of Homeless Children and Youth that will carry out the following functions as described in Section 722(d) of the Act:

   (a) Gather data on the number and location of the homeless children and youth, including data on the nature and extent of problems of access to, and placement of, these children in elementary and secondary schools, and the difficulties in identifying the special needs of such children.

   (b) Develop and carry out the State plan.

   (c) Prepare and submit to the Secretary of Education interim and final reports on the data gathered.

Question E.2.: What might States do in order to collect accurate information to include in the reports to the Department of Education?

Answer: In collecting information, States should make use of agencies that are most likely to have knowledge of homeless children and youth. These include local educational agencies (LEAs), representatives of advocacy groups, officials of public and private homeless shelters, and other public and private social service agencies. To ensure accuracy of the data, States should:

(1) Establish procedures to make certain data are collected in a uniform manner.

(2) Provide a system to eliminate possible duplication of counts.

(3) Establish a means to verify information. This might include a secondary system that would follow up on a sample of the children to determine accuracy.

(4) Consult with neighboring States, especially in those circumstances when homeless children and youth may be crossing State lines.

Question E.3.:	With what groups should SEAs consult in planning and carrying out their programs?
Answer:	The Department encourages SEAs to coordinate the planning and administration of their programs with the various child advocacy service groups active in the State.

F. ITEMS CONCERNING THE STATE PLAN

Question F.1.:	What provisions must be included in the State plan?
Answer:	Each State plan shall include provisions designed to:

(1) Authorize the SEA, LEA, the parent or guardian of the homeless child, the homeless youth, or applicable social worker to make determinations required under Section 722(e) of the Act.

(2) Provide procedures for the resolution of disputes regarding the educational placement of homeless children and youth.

(3) Ensure, to the extent practicable, that the LEAs within the State will comply with the following:

  (a) The LEA must continue the homeless child's or youth's education in the school district of origin for the remainder of the year, or enroll the child or youth in the district in which he or she is actually living, whichever is in the child's or youth's best interest.

  (b) The choice regarding placement shall be made regardless of whether the child or youth is living with the homeless parents or has been temporarily placed elsewhere by the parents.

  (c) The LEA must provide to the homeless child or youth services comparable to services offered to other students in the school selected.

  (d) The LEA must maintain appropriate school records of each homeless child or youth.

In constructing its State plan, the Department of Education urges the State to give deference to the wishes of parents or guardians of homeless children and youth and to the wishes of the homeless youth.

Question F.2.:	What action does the Department of Education take with respect to the State plan?
Answer:	The Department of Education will review the plan to ensure that the issues set forth in the Act are addressed. The Department will provide, if appropriate, comments on the plan and guidance to the State.

II. RELEVANT STATUTES AND REGULATIONS

A. Education Provisions of the Stewart B. McKinney Homelessness Assistance act

4. Department of Education Materials
    d. Relevant Sections of the General Education Provisions Act and Implementing Regulations

Relevant Excerpt from the General Education Provisions Act (GEPA); 20 U.S.C. Section 1232d

§ 1232d. Single State application

(a) Submission of general application; approval by State supervisory authority

In the case of any State which applies, contracts, or submits a plan, for participation in any applicable program in which Federal funds are made available for assistance to local educational agencies through, or under the supervision of, the State educational agency of that State, such State shall submit (subject, in the case of programs under titles I and IV of the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. §§ 2701 et seq., 3081 et seq.], to the provisions of title V of such Act [20 U.S.C.A. § 3141 et seq.]) to the Secretary a general application containing the assurances set forth in subsection (b) of this section. Such application may be submitted jointly for all programs covered by the application, or it may be submitted separately for each such program or for groups of programs. Each application submitted under this section must be approved by each official, agency, board, or other entity within the State which, under State law, is primarily responsible for supervision of the activities conducted under each program covered by the application.

(b) Assurances

An application submitted under subsection (a) of this section shall set forth assurances, satisfactory to the Secretary—

(1) that each program will be administered in accordance with all applicable statutes, regulations, program plans, and applications;

(2) that the control of funds provided under each program and title to property acquired with program funds will be in a public agency, or in a nonprofit private agency, institution, or organization if the statute authorizing the program provides for grants to such entities, and that the public agency or nonprofit private agency, institution, or organization will administer such funds and property;

(3) that the State will adopt and use proper methods of administering each applicable program, including—

(A) monitoring of agencies, institutions, and organizations responsible for carrying out each program, and the enforcement of any obligations imposed on those agencies, institutions, and organizations under law,

(B) providing technical assistance, where necessary, to such agencies, institutions, and organizations,

(C) encouraging the adoption of promising or innovative educational techniques by such agencies, institutions, and organizations,

(D) the dissemination throughout the State of information on program requirements and successful practices, and

(E) the correction of deficiencies in program operations that are identified through monitoring or evaluation;

(4) that the State will evaluate the effectiveness of covered programs in meeting their statutory objectives, at such intervals (not less often than once every three years) and in accordance with such procedures as the Secretary may prescribe by regulation, and that the State will cooperate in carrying out any evaluation of each program conducted by or for the Secretary or other Federal official;

(5) that the State will use fiscal control and fund accounting procedures that will ensure proper disbursement of, and accounting for, Federal funds paid to the State under each program;

(6) that the State will make reports to the Secretary (including reports on the results of evaluations required under paragraph (4)) as may reasonably be necessary to enable the Secretary to perform his duties under each program and that the State will maintain such records, in accordance with the requirements of section 1232f of this title, and afford access to the records as the Commissioner may find necessary to carry out his duties;

(7) that the State will provide reasonable opportunities for the participation by local agencies, representatives of the class of individuals affected by each program and other interested institutions, organizations, and individuals in the planning for and operation of each program, including the following:

(A) the State will consult with relevant advisory committees, local agencies, interest groups, and experienced professionals in the development of program plans required by statute;

(B) the State will publish each proposed plan, in a manner that will ensure circulation throughout the State, at least sixty days prior to the date on which the plan is submitted to the Secretary or on which the plan becomes effective, whichever occurs earlier, with an opportunity for public comments on such plan to be accepted for at least thirty days;

(C) the State will hold public hearings on the proposed plans if required by the Secretary by regulation; and

(D) the State will provide an opportunity for interested agencies, organizations, and individuals to suggest improvements in the administration of the program and to allege that there has been a failure by any entity to comply with applicable statutes and regulations; and

(8) that none of the funds expended under any applicable program will be used to acquire equipment (including computer software) in any instance in which such acquisition results in a direct financial benefit to any organization representing the interests of the purchasing entity or its employees or any affiliate of such an organization.

(c) Effective term of general application

Each general application submitted under this section shall remain in effect for the duration of any program it covers. The Secretary shall not require the resubmission or amendment of that application unless required by changes in Federal or State law or by other significant changes in the circumstances affecting an assurance in that application.

(Pub.L. 90-247, Title IV, § 435, as added Pub.L. 95-561, Title XII, § 1231(a)(3), Nov. 1, 1978, 92 Stat. 2343, and amended Pub.L. 96-88, Title III, § 301(a)(1), Title V, § 507, Oct. 17, 1979, 93 Stat. 677, 692; Pub.L. 98-511, Title VII, § 706(a), Oct. 19, 1984, 98 Stat. 2406.)

Relevant Excerpt from Implementing Regulations for the General Education Provisions Act (GEPA); 34 C.F.R. Section 76.101

§ 76.101 The general State application.

(a) This section applies to the programs listed in § 76.1 under which a State educational agency may make subgrants to local educational agencies.

(b) (1) A State shall submit to the Secretary a general application that contains the assurances contained in paragraph (e) of this section.

(2) The State may submit—

(i) A single general application to cover all of the programs; or

(ii) More than one general application, each general application covering either a group of programs or an individual program.

(c) A general application must be approved by each official, agency, board, or other entity within the State that, under State law, is primarily responsible for supervision of the activities conducted under each program covered by the application.

(d) Each general application submitted under this section remains in effect for the duration of any program it covers. The Secretary does not require the resubmission or amendment of that application unless required by changes in Federal or State law or by other significant changes in the circumstances affecting an assurance in that application.

(e) A general application must include assurances, satisfactory to the Secretary—

(1) That each program will be administered in accordance with all applicable statutes, regulations, State plans, and applications;

(2) That the control of funds provided under each program and title to property acquired with program funds will be in a public agency, or in a nonprofit private agency, institution, or organization if the statute authorizing the program provides for grants to those entities, and that the public agency or nonprofit private agency, institution, or organization will administer the funds and property;

(3) That the State will adopt and use proper methods of administering each program, including—

(i) Monitoring of agencies, institutions, and organizations responsible for carrying out each program, and the enforcement of any obligations imposed on those agencies, institutions, and organizations under law;

(ii) Providing technical assistance, if necessary, to those agencies, institutions, and organizations;

(iii) Encouraging the adoption of promising or innovative educational techniques by those agencies, institutions, and organizations;

(iv) The dissemination throughout the State of information on program requirements and sucessful practices; and

(v) The correction of deficiencies in program operations that are identified through monitoring or evaluation;

(4) That the State will evaluate the effectiveness of each program in meeting statutory objectives—not less often than once every three years—and that the State will cooperate in carrying out any evaluation of a program conducted by or for the Secretary or other Federal official;

(5) That the State will use fiscal control and fund accounting procedures that will ensure proper disbursement of, and accounting for, Federal funds paid to the State under each program;

(6) That the State will—

(i) Make reports to the Secretary—including reports on the results of evaluations required under paragraph (e)(4) of this section—as may reasonably be necessary to enable the Secretary to perform his or her duties under each program; and

(ii) Maintain records, in accordance with the requirements of Section 437 of GEPA—and afford access to those records as the Secretary may find necessary to carry out his or her duties; and

(7) That the State will provide reasonable opportunities for the participation by local agencies, representatives of the class of individuals affected by each program, and other interested institutions, organizations, and individuals in the planning for and operation of each program, including the following:

(i) The State will consult with relevant advisory committees, local agencies, interest groups, and experienced professionals in the development of State plans.

(ii) The State will publish each proposed State plan, in a manner that will ensure circulation throughout the State, at least 60 days prior to the date on which the plan is submitted to the Secretary or on which the plan becomes effective, whichever occurs earlier, with an opportunity for public comments on the plan to be accepted for at least 30 days.

(iii) The State will hold public hearings on the proposed State plans if required by the Secretary by regulation.

(iv) The State will provide an opportunity for interested agencies, organizations, and individuals to suggest improvements in the administration of the program and to allege that there has been a failure by any entity to comply with applicable statutes and regulations.

(Authority: 20 U.S.C. 1232d)

NOTE 1: The Secretary interprets Section 435 of GEPA—implemented in this section—not to apply to State Vocational Education Programs. (See § 76.1) This interpretation is based on the legislative history of both GEPA and the Vocational Education Act.

NOTE 2: This section is based on a provision in the General Education Provisions Act (GEPA). Section 427 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3487, provides that except to the extent inconsistent with the DEOA, the GEPA "shall apply to functions transferred by this Act to the extent applicable on the day preceding the effective date of this Act." Although standardized nomenclature is used in this section to reflect the creation of the Department of Education, there is no intent to extend the coverage of the GEPA beyond that authorized under Section 427 or other applicable law.

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86296, Dec. 30, 1980]

§ 76.102 Definition of "State plan" for Part 76.

As used in this part, "State plan" means any of the following documents:

(a) *Compensatory education.* The application under Section 162 of Title I of the Elementary and Secondary Education Act.

(b) *Migrant children.* The application under Sections 141-143 of the Elementary and Secondary Education Act.

(c) *Basic skills.* The agreement under Title II-B of the Elementary and Secondary Education Act.

(d) *Library resources.* The State plan under Title II of the Elementary and Secondary Education Act (as in effect on Sept. 30, 1978).

(e) *Innovative projects; Guidance and Counseling.* The State plan under Title III of the Elementary and Secondary Education Act (as in effect on Sept. 30, 1978).

(f) *Educational Improvement, Resources, and Support.* The State plan under Title IV of the Elementary and Secondary Education Act.

(g) *State educational agencies.* The State plan under Title V-B of the Elementary and Secondary Education Act.

(h) *State educational agencies.* The application under Title V-A of the Elementary and Secondary Education Act (as in effect September 30, 1978).

(i) *Community schools.* The State plan under Title VIII of the Elementary and Secondary Education Act.

(j) *Gifted and talented children.* The application under Section 904(b)(1) of Title IX of the Elementary and Secondary Education Act.

(k) *Academic subjects.* The State plan under Title III-A of the National Defense Education Act.

(l) *Handicapped children.* The State plan under Part B of the Education of the Handicapped Act.

(m) *Handicapped children.* The application under Section 619 of the Education of the Handicapped Act.

(n) *Vocational education.* The annual program plan and the annual accountability report under Part A of Title I of the Vocational Education Act.

(o) *Career education.* The State plan under Section 7 of the Career Education Incentive Act.

(p) *Adult education.* The State plan under the Adult Education Act.

(q) *Community services.* The State plan under Title I of the Higher Education Act.

(r) *State student incentive grants.* The application under Section 415C of the Higher Education Act.

(s) *Educational information centers.* The State plan under Section 418B of the Higher Education Act.

(t) *Incentive grants for State student financial asistance training.* The ap-

II. RELEVANT STATUTES AND REGULATIONS

A. Education Provisions of the Stewart B. McKinney Homelessness Assistance act

4. Department of Education Materials
    e. Center for Law & Education Suggestions for Non-regulatory Guidelines

CENTER FOR LAW AND EDUCATION, Inc.

Larsen Hall, 6th Floor
14 Appian Way
Cambridge, Massachusetts 02138
617-495-4666

Reply to:
236 Massachusetts Ave., N.E. Suite 504
Washington, D.C. 20002
202-546-5300

August 13, 1987

Mr. Tom Faegan
Office of Compensatory Programs
U.S. Department of Education
2043 FOB-6
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Dear Tom:

Enclosed are some suggestions on questions and answers for the non-regulatory guidance on education for homeless children and youth. We hope you find them useful and would appreciate hearing your reactions.

You will note that question 5 refers to, but does not contain, the application requirements under Sec. 722(f). We are working on suggested application requirements and will send them to you shortly.

Please let us know if we can help in any other way.

Sincerely,

Lucy Watkins
Education Advocate

Paul

Paul Weckstein
Director of D.C. Office

LW:PW:mv
Enclosure

August 11, 1987

Non-Regulatory Guidelines - Education of Homeless Children and Youth

1. What is the Congressional policy in Sec. 721 concerning access to education?

Under Sec. 721(1), each State must assure that each child of a homeless individual and each homeless youth have access to a free, appropriate public education which would be provided to the children of a resident of a State and is consistent with the State school attendance laws. The basic standard here is one of non-discrimination, so that such children are not treated differently from children of other residents. Thus, the child must not be discriminated against on the basis of homelessness, including situations in which the child of a homeless person or a homeless youth is, because of homelessness, temporarily absent from a school attendance area, is not in permanent housing in an attendance area, or is residing with a person other than the parent or guardian. Thus, on the one hand it would be discriminatory to treat a homeless child living in a shelter and seeking admission in the school serving the attendance area where the shelter is located differently from any other child living in that attendance area. On the other hand, it would be discriminatory to deny enrollment to a child seeking continued attendance in the original school on the basis of temporary absence from the attendance area of origin simply because, for example, a family is temporarily placed elsewhere but intends to maintain its permanent residence in that area. These principles would also apply to a child who has been placed elsewhere, such as with a friend or relative, by a homeless family. Thus, the parent cannot be forced to relinquish legal guardianship when a child is so placed, in order for a child to be allowed to attend school where living temporarily.

These principles would also apply to a homeless or runaway youth who is not living with a legal guardian.

Under Sec. 121(2), in any State that has a residency requirement as a component of its compulsory school attendance laws, the State will review and undertake to revise such laws to assure that the children of homeless individuals and homeless youth are afforded a free and appropriate public education. Under the policy of Congress against discrimination because of homelessness, the possession of a permanent place to live or lack thereof is not a determinant of residency within a state, or in any school district or attendance area within that state. Each state is responsible for homeless children's access to free, appropriate public education, and should undertake an immediate review of its residency requirements in order expeditiously to assure that they do not pose barriers to providing access to free appropriate public education to homeless children and youth, in order to notify LEA's of their responsibilities under the law, and in order to forestall any delays occasioned by residency laws to the development of a state plan.

2. May a homeless student seeking enrollment in school be denied attendance prior to adoption of a state plan under Sec. 722(e)?

   A homeless child may not be turned away from school prior to adoption of an overall state plan.

First, the obligations under the policy in Sec. 721 are not contingent upon adoption of the plan. States are responsible under that policy for assuring that each homeless child have access to a free, appropriate public education which would be provided to the children of residents. Thus, where a state has not adopted a plan under Sec. 722(e), the basic prohibition against discrimination, as explained in question #1 above, still exists.

Second, grants provided under Sec. 722 are to be used to carry out the policies in Section 721, as well as to prepare and carry out the state plan. In applying for funds under Sec. 722, the state will be required to submit an assurance of compliance with those equal access/non-discrimination policies. That assurance is effective upon receipt of the funds.

Third, local educational agencies in States receiving funds under Sec. 722 have obligations under Sec. 722(e)(3) through (6). These obligations exist in such States independent of the State plan. The purpose of the State plan is, under Sec. 722(e)(2), to provide methods for the State to assure local educational agencies compliance with those obligations.

3. What is a State authorized to do with its grant?

The first obligation a State has is to carry out the policies set forth in Sec. 721, as explained in Questions 1 and 2 above. To accomplish this, a State is expected to provide effective public notice and notify to all local educational agencies of the grant and the responsibility for enforcing the policies in Sec. 721.

The second obligation a State has is to establish or designate an Office of Coordinator of Education of Homeless Children and Youth. States are encouraged also to form an interagency council to better coordinate the development and implementation of a State plan.

The third obligation a State has is to prepare and carry out the State plan. This plan must be based on data gathered as required in Sec. 722(d)(1) on the number and location of homeless children and youth in the State, the nature and extent of problems of access to, and placement of homeless children and youth, and the difficulties in identifying the special needs of such children. The State must also address and determine the uses of grant funds and other State and local resources, if any, to develop and implement the State plan. The State must also address the process for developing and implementing the State plan.

4. What are the responsibilities of the Office of Coordinator?

In order to fulfill the requirements of Sec. 721 and the authorized activities in Sec. 722(c), the Coordinator shall gather data as explained in Question 3 above, except that he may make use of data already available, if they are reliable and current.

To the extent that reliable and current data do not exist in the state, the Coordinator should draw upon the information and knowledge of advocates of the homeless, homeless persons, shelters for the homeless, state and local social service agencies, and local educational agencies.

The Coordinator must prepare and submit to the Secretary an interim report by December 31, 1987, and a final report by December 31, 1988, on the data gathered. He is expected to make these reports available to all relevant agencies, local educational agencies, advocates of the homeless, shelters of the homeless, the homeless, and the public, because it is these reports on which are based the uses of grant funds and other state and local resources, if any.

The Coordinator is also responsible for the preparing and carrying out the State plan. In doing so the Coordinator should set up a process, consistent with the requirements of Sec. 435 of the General Education Provision Act, that includes, but is not limited to:

- Effective public notice of the receipt of funds and the purposes of Subtitle B.
- Effective public notice of the process for developing a State plan.
- A process for the on-going participation of education officials, social service officials, shelter personnel, advocates of the homeless, and homeless persons in development and implementation of the plan.
- Communication of the proposed plan at least 60 days before its adoption to the public and education officials, social service

officials, shelter personnel, advocates of the homeless, and homeless persons.

- Public hearings, to which education officials, social service officials, shelter personnel, advocates of the homeless, and homeless persons are invited.

- At least thirty days for comments on the plan before its adoption.

- Communication of the final plan to the public and education officials, social service officials, shelter personnel, advocates of the homeless, and homeless persons.

- A process of providing education officials, social service officials, shelter personnel, advocates for the homeless, and homeless persons an opportunity to suggest improvements in administration of the program and to allege non-compliance by any entity.

5. What are the requirements for application for funding?

   A State application must contain or be accompanied by such information as the Secretary may reasonably require. It must contain assurances that the state will comply with the policies of Congress as set forth in Sec. 721, and other assurances as set forth in Sec. 435 of the General Education Provisions Act. (See Requirements for Application for Grants under Subtitle B-Education for Homeless Children and Youth.)

6. What must be contained in the State plan?

The State plan must make provisions for:

-- Procedures to authorize the State educational agency, the local educational agency, the parent or guardian of the homeless child, the homeless youth, or the applicable social worker to make the determinations required under Sec. 722;

-- Procedures for the resolution of disputes regarding the educational placement of homeless children and youth;

-- Procedures to assure, to the extent practicable under requirements relating to education established by State law, that local educational agencies within the State will comply with the requirements of paragraphs (3) through (6) of Section 722.

In developing the State plan, the following questions should be considered and addressed:

(a) How will the funds be used to meet the specific access and placement problems and special needs revealed by the data collected under Sec. 722(d)(1)?

(b) Who will determine the "best interest" of a homeless student?

- How will the primacy of the parental role in their child's best interest be taken into account?

- In the case of homeless or runaway youth, will their views and those of shelter counselors be taken into account?

(c) What will be the standard for the "best interest" of a homeless child? Does this standard give adequate weight to:

- the need to minimize disruption in the child's education?

- parents' intent about future residence -- to either return to the child's prior school district, or to remain in the school district in which the family is temporarily sheltered?

(d) How will school placement decisions meet the overall legal mandate (under Sec. 721) to avoid discriminatory treatment of homeless children? Will these decisions ensure:

- That families residing in shelters are not treated differently from other, non-homeless residents when they seek to enroll their children in the attendance area where they are sheltered?

- That families intending to return to their prior district of residence, and wishing to continue enrollment in that prior district, are not treated differently from other, non-homeless families who travel temporarily outside the district?

- That children of homeless families who have been temporarily placed with a friend or relative will not be barred from school on the condition that the homeless parents surrender their legal parental rights?

- That homeless or runaway youth will not be barred from school because they are not living with a legal guardian?

(e) What procedures will be used to resolve disputes over a homeless student's educational placement?

- Do these procedures provide for a full and impartial determination of the child's best interest (independent decision maker, adequate notice, right to representation, to present and cross examine witnesses and evidence, findings, and appeal)?

- Do these procedures assure that a child's education will not be disrupted during the pendency of any dispute?

(f) Will transportation always be provided when needed to allow attendance at the school that meets the child's best interest?

(g) How will state and local officials ensure that homeless students receive equal access to special educational services?

(h) How will state and local officials ensure that the school records of homeless children are available in a timely manner when these children move to a new school district?

(i) Will state or local education officials be encouraged to coordinate with agencies responsible for placing homeless families in order to avoid disruption of education (e.g., so that shelter agencies are encouraged to keep families sheltered in their same school attendance area)?

(j) What outreach programs and procedures will be used to contact and provide the above services to all homeless families and youth?

(k) How will state officials publicize the Act's provisions and the requirements included in state plans to local educational agencies?

(l) How will the State provide opportunities for local agencies representatives of the homeless, and other interested parties to participate in the planning and operation of programs under the Act, as required by GEPA Sec. 435(b)(9)?

(m) What provisions will be made for monitoring and assisting local compliance with the provisions of the McKinney Act and implementation of the plan, consist~~ed~~ent with GEPA Sec. 435(b)(3)? Do these tools include:

- Site visits?
- Collection of local data and reports?
- Review of educational placement decisions?

- Consultation with and participation of homeless persons and their advocates in program planning and operation?
- Well publicized complaint procedures?
- Strict and effective timelines and remedies for correcting deficiencies?
- Technical assistance encouragement of adoption of promising or innovating techniques and dissemination of information or program requirements and successful practices?
- Evaluation of program effectiveness [435(b)(4)]?

7. Under the State plan, how is the placement of homeless children and youth to be determined?

The State plan has to establish a substantive standard and procedures for determining the placement of homeless children and youth, and services to them. First, the State must insure that the standard to be used is the best interest of the child. Second, the State must insure that determinations of placement, provision of services, maintenance and availability of records, and provision of transportation to the school that meets the best interest of the child or youth are made by the state educational agency, the local educational agency, the parent or guardian of the homeless child, the homeless youth, or the applicable social worker.

In establishing a standard and procedures, the plan should address the primacy of the parent in determining the child's best interest (or in the case of a homeless or runaway youth, that addresses the primacy of the youth and the shelter counselor in determining the youth's best interest). States can assume that parents generally represent their children's best interest. Normally, parents are responsible for and are the ones who will know what is in the best interest of their child. In addition, of course, the parents are also the primary source of information about the family's intentions as to their continued residence -- that is, whether they intend to maintain their permanent residence in the area the child has previously been attending school or whether they intend to maintain residence in the area where they are now sheltered.

In addition, State's requirements for determination of placement of a homeless child or youth must be read consistently with the policy of equal access and non-discrimination as discussed in Question 1. The child must not be discriminated against on the basis of homelessness, including situations in which the child of a homeless person or a homeless youth is, because of homelessness, temporarily absent from a school attendance area, is not in permanent housing in an attendance area, or is residing with a person other than the parent or guardian. Thus, on the one hand it would be discriminatory to treat a homeless child living in a shelter and seeking admission in the school serving the attendance area where the shelter is located differently from any other child living in that attendance area. On the other hand, it would be discriminatory to deny enrollment to a child seeking continued attendance in the original school on the basis of temporary absence from the attendance area of origin simply because, for example, a family is temporarily placed elsewhere but intends to maintain its permanent residence in that area.

Because determining placement must be governed by a homeless child or youth's best interest, the State requirement must recognize that neither administrative convenience nor costs can be the basis of determination.

8. The bill requires states to establish procedures for resolving disputes about which school district a homeless child should be educated in. How will these procedures ensure that the education of homeless children is not interrupted and that homeless children are not discriminated against in obtaining the education to which they are entitled?

The purpose of these procedures is to ensure that, when there is a dispute about which school a homeless child should attend, that dispute is fairly and expeditiously resolved. Because the child's interest in education is affected, before a school district could deny admission or continued attendance to such homeless children, the procedures must provide for a prompt determination in a manner that comports with due process -- including, for example, full and timely notice, with adequate time to prepare; the opportunity of the child to be represented in the proceedings, present evidence, and confront and cross-examine witnesses; and written findings. The determination should be made by an independent, impartial decision-maker, who should not be an employee of either of the local agencies involved in the dispute. The procedures should also assure that, during the pendency of the proceedings, the child continues to receive an education in the school previously attended or if there is no such school, the school serving the attendance area where the child is currently housed.

9. How is the State to assure that local educational agencies are:

   a. Providing for each homeless child or youth services comparable to services offered to other students in the school selected;

   b. Maintaining school records of each homeless child or youth so that they are available, in a timely fashion, when a child or youth enters a new school district; and

   c. Providing transportation to the school that meets the child or youth's best interest?

The State plan must include procedures that will enable the State to monitor and enforce the requirements of Sec. 722(e)(5) and (6) and the Conference Report. Such procedures shall address:

a. How local educational agencies will determine eligibility, provide assessments, secure prior evaluations, and ensure enrollment of a homeless child or youth in educational services for which the child meets the eligibility criteria, such as compensatory educational programs for the disadvantaged, and educational programs for the handicapped and for students with limited English proficiency; programs in vocational education; programs for the gifted and talented; and school meals programs. Since placement as required in Sec. 722(e)(3) and (4) will be determined by the child or youth's best interest, which will include considerations of the least disruptive placement, it is less likely that a child or youth will be a student at the school on a temporary basis. But if a child or youth is placed in a new school, local educational agencies will need to cooperate with each other to facilitate provision of services.

b. How local educational agencies will maintain school records of each homeless child or youth, and transfer them in a timely fashion if a homeless child or youth is, in his or her best interest, placed in a new school. The unavailability of records, or delays in their transfer, should not be countenanced when schools have at their disposal modern methods of photocopying, electronic storage and transfer, and the U.S. Postal Service.

c. How local educational agencies will provide transportation to the school that has been determined to meet the child or youth's best interest. If a homeless child or youth is enrolled in a school in the shelter area, such free, public school transportation as is available to all children in that attendance area must be available in a non-discriminatory manner to the homeless child or youth. Further, if it is determined that it is in the homeless child or youth's best interest to be enrolled in a school outside the attendance area of the shelter, transportation must be provided where needed to effectuate that decision and permit that enrollment. Administrative cost or convenience of transportation are not determining factors in best interest placement.

10. How is the State to assure that local educational agencies comply with paragraphs (3) through (6)?

    The State plan must address the need for procedures for monitoring and assisting local compliance, consistent with the requirements of Sec. 435 of the General Education Provisions Act, including, but not limited to:

    - Site visits;
    - Collection of local data and reports;
    - Review of educational placement decisions;
    - Consultation with homeless persons and their advocates;
    - Well publicized complaint procedures, consistent with the requirements of 34 CFR Sec. 76.780-76.783 of the EDGAR regulations;
    - Strict and effective timelines and remedies for correcting deficiencies;
    - Technical assistance, encouragement of adoption of promising or innovating techniques, and dissemination of information or program requirements and successful practices;
    - Evaluation of program effectiveness [435(b)(4)].

11. Under section 722(e)(2), the state plan is to be designed, "to the extent practicable under requirements relating to education established by State law," to assure that local educational agencies comply with paragraphs (3) through (6). What if State law contains residency requirements which

limit the practicability of the state assuring such compliance, and under which children are being denied admission or continued attendance because of homelessness?

Section 722(e)(2) must be read consistently with the remainder of the subtitle, including the policy under Section 721. Under section 721(2), the State is to take steps to revise requirements of this kind.

12. What are the responsibilities of the Secretary and the General Accounting Office?

Under Section 724 of the Act, the Secretary has an affirmative obligation to monitor and review states' compliance with the Act, including their compliance with the General Education Provisions Act. For example, the Secretary will monitor compliance with the assurances provided by the State under section 435(b) of GEPA. Nothing in this subtitle, of course, is intended to limit remedies that may be available under this or other laws or the Constitution.

The Secretary will prepare and submit a report to Congress on the programs and activities authorized by this subtitle at the end of each fiscal year, and the Secretary will compile and submit a report to the Congress containing the information received from the States pursuant to Sec. 722(d)(3) within 45 days of its receipt.

The Comptroller General will prepare and submit to the Congress not later than June 30, 1988, a report on the number of homeless children and youth in all states.

The Conference report on this subtitle states that "It is intended that this report [the Secretary's report] encompass related activities conducted by all states, even if not all states participate in the program ...."

In the event that data submitted by any State to the Secretary and the General Accounting Office are inadequate or in the event that a State does not submit a report on the number, location, and problems of access to education of homeless children and youth, the Secretary and GAO will communicate directly with providers of service to the homeless, State or local social service agencies, and other State or local agencies that can supply the necessary data.

13. What responsibilities toward homeless children exist in States which do not apply for grants under Sec. 722?

States which do not apply for grants under Sec. 722 are governed only by the Congressional policy under Sec. 721. That is, each child of a homeless individual and each homeless youth shall have access to a free appropriate public education which would be provided to the children of a resident of the State and is consistent with State school attendance laws, and the State is to review and if necessary revise any residency requirements in its compulsory attendance laws in order to assure that such children and youth are afforded a free and appropriate public education. See question 1 for further discussion as to the meaning of this Congressional policy. Such States are not responsible for the planning and data collection requirements under Sec. 722, and are not eligible for exemplary grants under Sec. 723 (nor are other entities within such States). As noted in the Conference

Report, the Secretary's report under Sec. 724 will encompass related activities in all States, including those which do no not participate in the grant program under Sec. 722.

II. RELEVANT STATUTES AND REGULATIONS

B. Compilation of State School Residency Laws

CENTER FOR LAW & EDUCATION, INC.
Larsen Hall, 6th Floor
14 Appian Way
Cambridge, Massachusetts 02138

Survey of Residency Requirements for Free Public Education in the Fifty United States of America, Puerto Rico and the Virgin Islands

ALABAMA

Every child between the ages of seven and sixteen years is required to attend school for the entire length of the school term in every scholastic year. ALA. CODE section 16-28-3 (1977 & Supp. 1986). The city boards of education offer advantages of public schools to children who are *bona fide* residents of and living within the respective corporate limits of such cities. *Id.* section 16-11-16 (1977).

ALASKA

Every child between seven and sixteen years of age must attend school at the public school in the district in which the child resides during each school term. ALASKA STAT. section 14.30.010 (1982 Supp. 1986). A school district may cooperate voluntarily or under the direction of the department of education to admit a nonresident student into the school district subject to the terms and conditions of any contract for transfer. *Id* section 14.14.110 (1982).

ARIZONA

School attendance is compulsory for children between the ages of eight and sixteen years. ARIZ. REV. STAT. ANN. section 15-802 (1984 & Supp. 1986). A school district may admit children between the ages of six and twenty-one who reside in the school district. *Id.* section 15-821 (1984). The governing board of a school district may admit children who do not reside in the district but who reside within the state upon such terms as it prescribes, which may include the payment of tuition. *Id.* section 15-823 (1984 & Supp. 1986).

ARKANSAS

School attendance is required of every person residing within the State of Arkansas between the ages of seven and fifteen (both inclusive). ARK. STAT. ANN. section 80-1502 (1980). Public schools are free and open to all persons between the ages of six and twenty-one residing in the school district. *Id.* 80-1502.

CALIFORNIA

All persons between the ages of six and sixteen are subject to compulsory full-time education in the school district in which the residency of either the parent, guardian or other person having control or charge of such pupil. CAL. EDUCATION CODE section 48200 (West 1984).

Notwithstanding section 482000, a pupil is deemed to have complied with the residency requirements for school attendance in a school district provided that she is a pupil placed within the boundaries of that school district in a regularly established licensed children's institution, is in a licensed foster home, or in a family home. *Id.* section 48204. The California Code contains provisions for the education of children in migrant families, but limits their scope to children whose families work in agriculture or fishing. *Id.* sections 54440-54445 (West 1984 & Supp. 1987).

COLORADO

School attendance is required of every child who has attained the age of seven years and is under the age of sixteen years. COLO. REV. STAT. section 22-33-104 (1974 & Supp. 1986).

Every public school is free and accessible to all children between the ages of six and twenty-one years residing in that district. A child is deemed a resident in a school district if:

a) both his parents, or the survivor of them, or the one of them to whom custody of the child has been awarded by any court of competent jurisdiction resides in the school district;

b) the legally appointed guardian of the child resides in the school district;

c) the child is emancipated from his parents and lives within the school district;

d) in the judgment of the board of education of the school district in which the child lives, the child has been abandoned by his parents;

e) the child has become permanently dependent for his maintenance and support on someone other than his nonresident parents, or upon any charitable organization, if the dependent child is actually to make his home and receive his support within the school district where he desires to attend;

f) if one of the child's parents or the guardian of his person is a public officer or employee living temporarily, for the performance of his duties, in a school district other than that of his residence. If the parents of the child are permanently separated, the residence of the husband is deemed to be the residence of the child, but if the parents are permanently separated, the residence of the child is that of the parent with whom the child actually lives; or

g) regardless of the residence of the parents, if any, the child adopts a dwelling place within the district with the intent to remain there indefinitely and with the intent not to return to the dwelling place from which he came, and regularly eats or sleeps there, or both, during the entire school year. If the child regularly returns to another dwelling place during summer vacations or weekends, he is not deemed to have the requisite intent to remain.

Id. section 22-1-102 (1974).

A nonresident may be accepted as a pupil in the school district in which he attends, and may be charged tuition for the privilege. *Id.* section 22-33-103 (1974).

The Code also provides for the education of migrant children in Article 23 of Title 22. A "migrant child" is defined as any child of school age who is in the custody of migrant agricultural workers, regardless of whether they are his parents. *Id.* section 22-23-103 (1974). The residence of a migrant child, for purposes of education, is the school district where the migrant child is receiving shelter and the necessities of life. *Id.* section 22-23-105(1)(a) (1974).

CONNECTICUT

Every child seven years of age and over and under sixteen years of age is required to attend school in the district where the child resides. CONN. GEN. STAT. ANN. section 10-184 (West 1986).

Children residing with relatives or nonrelatives, when it is the intention of such relatives or nonrelatives and of the children or their parents or guardians that such residence is to be permanent, provided without pay and not for the sole purpose of obtaining school accomodation, are entitled to all free school privileges accorded to resident children of the school district in which they reside. *Id.* section 10-253 (West 1986).

DELAWARE

School attendance is required for all children between the ages of six and sixteen years, and the child shall be enrolled in the school district of his parent's residence. DEL CODE ANN. tit. 14, section 2702 (1981 & Supp. 1986).

DISTRICT OF COLUMBIA

Regular school instruction is required for every child between the ages of seven and sixteen years residing permanently or temporarily in the District of Columbia. D.C. CODE ANN. section 31-401 (1981). In the case of a child who attends the public schools of the District of Columbia and does not have a parent or guardian who resides within the District, or is not an orphan, tuition must be paid to the Board of Education in an amount fixed by the Board. *Id.* section 31-602 (1981).

FLORIDA

Every child who has attained the age of seven years and who has not attained the age of sixteen years is required to attend school regularly during the entire school term. FLA. STAT. ANN. section 232.01 (West 1977 & Supp. 1986). Pupils whose parents or guardians are nonresidents of Florida must be charged a tuition fee at the time the pupil is enrolled. *Id.* section 228.121(1) (1977). A "nonresident" is defined as a person who has lived in Florida less than one year, has not purchased a home which is occupied by him as a residence prior to the enrollment of his child, and has not filed a manifestation of domicile in the country where the child is enrolled. *Id.* section 228.121(2) (1977).

GEORGIA

Every child between his seventh and sixteenth birthdays is required to attend school in the school district in which he resides. GA. CODE ANN. section 32-2104.1(a) (Harrison Supp. 1986).

HAWAII

All children who have reached the age of six years, but who have not reached the age of eighteen years on or before December 31 of any school year are subject to the compulsory school attendance law. HAWAII REV. STAT. section 298-9 (1985).

All persons of school age are required to attend the school of the district in which they reside unless granted permission to do otherwise by the department of education. *Id.* section 298-18 (1985).

IDAHO

School attendance is compulsory for any resident in the state who has attained the age of seven years at the time of the commencement of school in his district, but not the age of sixteen years. IDAHO CODE section 33-202 (1981).

The board of trustees of any school district may determine that it is in the best interest of any of its pupils to attend school in another district within the state, and transfer such pupils to that district upon a written agreement with the transferee district and the payment of tuition by the transferor district parent or guardian to the transferee district. *Id.* sections 33-1403, 33-1404 (1981). When a pupil attends a school in a district other than his home district because he has been transferred to a private non-state-supported youth care facility which is duly licensed by any agency of the state of Idaho, the youth-care facility must apply to the board of trustees of the home school district for approval of the tranfer. *Id.* section 33-1402A (1981 & Supp. 1986).

For the purposes of tuition charges and payments, "residence" of a pupil means that residence of his parent or guardian. "Home district" means the school district of the pupil's residence. "Nonresident pupils" means pupils attending school in districts other than their home districts, or from other states. *Id.* section 33-1401 (1981).

ILLINOIS

Every child between the ages of seven and sixteen must attend some public school in the district in which he resides. ILL. ANN. STAT. ch. 122, section 26-1 (Smith-Hurd 1962 & Supp. 1986).

INDIANA

School attendance is compulsory for every child from the date he reaches the age of seven years until the date on which he reaches the age of sixteen years. IND. CODE ANN. section 20-8.1-3-17 (Burns 1985 & Supp. 1986).

If a student is under eighteen years of age, or over that age but not emancipated, the legal settlement of the student is in the attendance area of the school corporation where the student's parents reside. *Id.* section 20-8.1-6.1-1(a) (Burns 1985). If the parents are divorced or separated, it lies in the attendance area of the school corporation where the student's custodial parent resides. *Id.* section 20-8.1-6.1-1(b) (Burns 1985). If the legal settlement of a student cannot reasonably be determined, and the student is being supported, cared for and living with some other person, the legal settlement of the student is in the attendance area of that person's residence. *Id.* section 20-8.1-6.1-1(c), (e) (Burns 1985). If the student is married or emancipated, the legal settlement is the attendance area of the school corporation of the student's own residence. *Id.* section 20-8.1-6.1-1(f) (Burns 1985).

IOWA

Compulsory school attendance is required of all children over seven and under sixteen years of age. IOWA CODE ANN. section 299.1 (West 1949 & Supp. 1986). Nonresident children and those of school attendance age (between five and twenty-one years of age) sojourning temporarily in any school corporation may attend school in that district in accordance with the terms set forth by the local school board. IOWA CODE ANN. section 282.1 (West 1949 & Supp. 1986). Public schools are tuition-free to all actual residents of school attendance age, implying that the child's parents or custodian reside in the district. *Id.* section 282.6 (West 1949 & Supp. 1986).

KANSAS

Any child who has reached the age of seven years and is under the age of sixteen years is required to attend school. KAN. STAT. ANN. section 17-1111 (1985). Any child who has attained the age of eligibility for school attendance may attend school in the district in which the child lives if 1) the child lives with a resident of the district and the resident is the parent, or person acting as parent, of the child; or 2) the child lives in the district as a result of placement therein by a district court or by the secretary of social and rehabilitation services. KAN. STAT. ANN section 72-1046 (1985). A nonresident child may be accepted into a school district in which the child is not a resident if the school district in which the child resides has entered into an agreement with the transferee school district. *Id.* Some nonresident pupils may be charged tuition by the transferee school district. *Id.* section 72-1046a (1985).

KENTUCKY

School attendance is compulsory for all children between the ages of six and sixteen inclusive. Every child actually residing in the state is subject to the laws relating to compulsory attendance, and neither he nor the person in charge of him shall be excused from the operation of those laws or the penalties under them on the ground that the child's residence is seasonable or that his parent is a resident of another state. KY. REV. STAT. section 159.010 (1987).

LOUISIANA

School attendance is compulsory for all children between the ages of seven and fifteen, both inclusive. REV. STAT. ANN. section 17:221 (West 1982 & Supp 1987). The general provisions regarding public schools and school children imply that parish school boards have a duty to provide school facilities to only the children residing in the parish. *Id.* section 17:151 (West 1982). However, local school boards may, by mutual agreement, provide for the admission to any school pupils residing in adjoining parishes and for transfer of school funds or other payments by one board to another on account of the transfer. *Ibid.* sections 17:105, 155 (West 1982 & Supp. 1987). The residence (domicile) of a minor not emancipated is that of his father, mother or tutor. LA. CIV. CODE ANN. ART. 39 (West 1952 & Supp. 1987).

MAINE

All persons seven years of age or older an under 17 years must attend school during the time that public day school is in session. ME. REV. STAT. ANN. tit. 20, section 5001-A (1983 & Supp. 1986). For the purposes of this provision, a person is considered a resident of the school administrative unit where his parent or guardian of legal custody resides. *Id.* tit. 20-A, section 5202 (1983 & Supp. 1986).

MARYLAND

Every child who resides in the State of Maryland and is six years old or older and under sixteen years must attend school. MD. EDUC. CODE ANN. section 7-301 (1985 & Supp. 1986). All children who are five years old or older and under twenty-one years are admitted free of charge to the public schools of the state. *Id.* section 7-101 (1985).

Parents of a child entering Prince George's County schools must complete an affidavit of disclosure as a prerequisite for the child's admission to the public schools of that country. *Id.* section 7-102(b) (1985). The purpose of the affidavit of disclosure is limited to ascertaining the child's legal residency and duration of residency in the state. *Id.* section 7-102(c) (1985).

With the advice of the county superintendent, the county board determines the geographical attendance area for each public school. *Id.* section 4-108 (1985).

Regarding the domicile of a minor, if the parents of a minor child live together, and the child lives with them, the domicile of the child is the same as that of the parents. MD. FAM. LAW section 5-204(a)(a) (1984 & Supp. 1986). If the minor child has only one parent, the domicile of the child is the same as that of the parent. *Id.* section 5-204(a)(a) (1984 & Supp.) If the parents live apart, the domicile of the child is with the legal custodial parent or if custody has not been awarded, the parent with whom the child lives. *Id.* section 5-204(b)(1), (2) (1984).

MASSACHUSETTS

Every child between the minimum and maximum ages established for school attendance by the board of education, with specific exceptions for children between the ages of fourteen and sixteen, must attend school. MASS. GEN. LAWS ANN. ch. 76, section 1 (West 1982 & Supp. 1987).

Every child has the right to attend the public schools of the town where he actually resides. *Id.* 76, section 5 (West 1982 & Supp. 1987). If a child resides temporarily in a town other than the legal residence of his parent or guardian for the special purpose of attending school there, the town may recover tuition from the parent or guardian. The school committee, however, may waive its right to recover tuition. *Id.* 76, section 6 (West 1982 & Supp. 1987).

MICHIGAN

Every child between the ages of six and sixteen years is required to attend school. MICH. COMP. LAWS ANN. section 340.731 (West 1976 & Supp. 1986). A child is considered a resident of the school district in which his parents reside, and is, therefore, entitled to free access. A child placed under the order or direction of a court or child placing agency in a licensed home, or a child whose parents or legal guardians are unable to provide a home for the child and who is placed in a licensed home or in a home of relatives in the school district for the purpose of securing a suitable home for the child and not for an educational purpose, is to be considered a resident for educational purposes of the school district where the home in which the child is living is located. The child is entitled to schooling in the schools in the district. *Id.* section 380.1148 (West Supp. 1986).

MINNESOTA

Every child between seven and sixteen years of age must attend school. MINN. STAT. ANN. section 120.10 (West 1960 & Supp. 1987). Admission to a public school is free to any person who resides within the district which operates the school and satisfies the attendance age requirements (between five and twenty-one years of age). *ID.* 120.06 (WEST 1960 & Supp. 1987).

MISSISSIPPI

The State of Mississipi does not have compulsory attendance provisions. The state legislature is charged with the maintenance and establishment of free public schools for all children between the ages of six and twenty-one. MISS. CONST. of 1890, art. 8, section 201 (1960). A minor child may not attend school except in the school district of his residence, unless lawfully transferred. MISS. CODE ANN. section 37-15-29 (1973 & Supp. 1986).

The legal residence of a minor is that of the father. After the death of the father, the residence of the minor is that of the mother. If the parents are divorced, the residence of the minor is that of her custodial parent; if custody was not granted, the residence continues to be that of the father. If both parents are dead, the residence of the minor is that of the last surviving parent at the time of that parent's death, unless the minor lives with a legal guardian, in which case her residence beomes that of the guardian. *Id.* section 37-103-7.

MISSOURI

Every child between the ages of seven and sixteen years is required to attend school and may attend public school without charge in her district of residence. MO. ANN. STAT. section 167.031 (Vernon 1965). The school board of any district, in its discretion, may admit to the school pupils not entitled to free instruction, and prescribe that tuition to be paid by them. *Id.* section 167.151(1) (Vernon 1965 & Supp. 1987). Orphaned children, children with only one parent living, and children whose parents do not contribute to their support – if the children are between the ages of six and twenty years and unable to pay tuition – may attend the schools of any district in the state in which they have a permanent or temporary home without paying a tuition fee. *Id.* section 167.151(2) (Vernon 1965 & Supp. 1987).

MONTANA

School attendance is compulsory for persons between the ages of seven and sixteen years. MONT. CODE ANN. section 20-5-102 (1985). The trustees of the school board must assign and admit any child to a school in the district when the child is a resident of the district. *Id.* section 20-5-101(1)(b) (1985).

NEBRASKA

Every child between the ages of seven and sixteen and residing in a school district within the State of Nebraska must attend school regularly. NEB. REV. STAT. section 79-201 (1981 & Supp. 1981). The school board or board of education may also admit nonresident pupils to the district school, determine the rate of tuition to be charged such pupils, and collect the tuition in advance. *Id.* section 79-445 (1981).

NEVADA

It is the responsibility of each parent, guardian or other person in the state of Nevada having control or charge of any child between the ages of seven and seventeen to send that child to a public school during all the time the public school is in session in the school district in which the child resides. NEV. REV. STAT. section 392.040 (1986). The board of trustees of any school district may, with the approval of the superintendent of public instruction, admit into the school district any pupil who lives in an adjoining school district within the state or in a state when the school district of residence in the adjoining state adjoins the receiving Nevada school district. *Id.* section 392.010 (1986).

NEW HAMPSHIRE

It is the duty of every child between six and sixteen years of age to attend the public school within the district, or with permission, a public school outside the district to which he is assigned or an approved private school during all the time the public schools are in session. N.H. REV. STAT. ANN. section 193:1 (Supp. 1973). The Code also provides that no person shall attend school, or send a public to the school, in any district of which she is not an inhabitant without the consent of the district or of the school board. *Id.* section 193:12 (1970).

NEW JERSEY

All children between the ages of six and sixteen are required to attend school. N.J. STAT. ANN. section 18A: 38-25 (West 1968). Public schooling is free to all persons over the age of five and under the age of twenty provided that a) the student is domiciled within the school district; b) the student is living with and gratuitously supported by another person domiciled within the school district; or c) the student's parents or guardian, while not domiciled within the district, reside there temporarily. *Id.* section 18A: 38-1 (West Supp. 1986).

NEW MEXICO

A person is required to attend school from the time he enters his eighth year until he will attain the age of majority. N.M. STAT. ANN. section 22-12-2 (1978 & Supp. 1986). A school-aged child has a right to attend public school within the school district in which he resides or is present. *Id.* section 22-12-4 (1978 & Supp. 1986).

NEW YORK

Full-time educational instruction is mandatory for all minors from six to sixteen years of age. N.Y. CIVIL SERVICE LAW section 3205 (McKinney 1981). A person over five and under twenty-one years of age who has not received a high school diploma is entitled to attend the public schools maintained in his district of residence without the payment of tuition. Nonresidents of a district may be admitted into the school or schools of a district or city upon the consent of the trustees or board of education, and upon the terms prescribed by the trustees or board. Those terms must include tuition payments. *Id.* section 3202 (McKinney 1981 & Supp. 1987).

NORTH CAROLINA

Children between the ages of seven and sixteen fall into the compulsory school age provision. N.C. GEN. STAT. section 1156-378 (1983). All pupils domiciled in a school district or attendance area are entitled to the privileges and advantages of the public schools of that district or attendance area at the school to which they are assigned by the local boards of education. *Id.* section 115C-366.

NORTH DAKOTA

The state requires that every parent, guardian, or other person who resides within any school district and has control over any educable child between the ages of seven and sixteen have their child attend a school within the district. N.D. CENT. CODE section 15-34.1-01 (1981). The school district in which the child resides is construed to be the residence district of the child if the child is living in a foster home, a home maintained by any nonprofit corporation, or any referrals made from a state-operated institution. Regarding the transfer of a student, the residence district is liable to the admitting district for tuition, and the transfer must be made with the consent of both school districts involved. *Id.* 15-40.2-08. It cannot take place if the school in the admitting school district would experience any injury or overcrowding. *Id.* 15-40.2-02.

OHIO

A child between six and eighteen years of age is "of compulsory school age" under the Ohio Code. OHIO REV. CODE ANN. section 3321.01 (Page 1985). The Code also provides that a child shall be admitted to the schools of the school district in which her parents reside free of charge. A child who does not reside in the district where her parent resides will be admitted as a resident student to the schools of the district in which she resides if a) she is in the legal or permanent custody of a government agency or a person other than his natural or adoptive parent; b) she resides in a home; or c) requires special education. There are also provisions for the payment of tuition by nonresident pupils. *Id.* section 3313.64 (B) (Page 1985).

OKLAHOMA

The Code makes it unlawful for a parent, guardian, custodian or other person having control of a child who is over the age of seven and under the age of eighteen, and who has not completed four years of high school work, to neglect or refuse to compel such a child to attend school. OKLA. STAT. ANN. tit. 70, section 10-105 (Supp. 1987). The residence of any child for school purposes is the legal residence of the parents, guardian, or person having the care and custody of the child if the parents, guardian, or person contributes in major degree to the support of the child. The term district of "residence" also includes foster homes or state-operated institutions; any orphanage or eleemosynary child care facility providing the child with full-time care and custody; any state institution in which the child has been placed by a parent or guardian for care and treatment due to a physical or mental condition of the child; the district in which a child who is entirely self-supporting resides and attends school; or the legal residence of the parents or guardian of a child who has been placed in a public or private residential child care or treatment facility, voluntarily by a parent or guardian, or by court order, by a state agency having legal custody. No school district may accept a nonresident child unless the transfer has been approved for the child by the district in which the child has legal residence. OKLA. STAT. ANN. tit. 70, section 1-113 (Supp. 1987).

OREGON

Compulsory school age covers all children seven through eighteen years who have not completed the 12th grade. OR. REV. STAT. section 339.010 (1985). The school district board shall admit free of charge to the schools of the district all persons between the ages of six and twenty-one residing within the district. The district school board may admit also nonresidents, detemine and fix rates of tuition for nonresidents. *Id.* section 339.115 (1985). The transferral of a student from the district to another can only be achieved through a written agreement between the transferee and the transferor school districts, and the cost must be assumed by the transferor district. *Id.* section 339.125.

PENNSYLVANIA

Every child residing in any school district and ages of six and twenty-one years may attend the public schools in her district. The board of school directors may admit, with or without payment of tuition, any nonresident child temporarily residing in the district, and may require attendance of such nonresident child in the same manner and on the same conditions as it requires the attendance of a resident child. PA. STAT. ANN. tit. 24, section 13-1301 (Purdon 1962). A child is considered a resident of the school district in which her parents or the guardian of her person resides. When the resident of any school district keeps in his home a child of compulsory school age, not his own, supporting the child *gratis* as if it were his own, the child is entitled to all free school privileges accorded to resident school children of the district. *Id.* tit. 24, section 13-1302 (Purdon Supp. 1986).

PUERTO RICO

Enrollment is compulsory for children between eight and fourteen years of age in any public school that may be located within reasonable distance of their homes. P.R. LAWS ANN. tit. 18, section 80 (1974).

RHODE ISLAND

Every child who is over the age of seven and under the age of sixteen is subject to the state's compulsory school attendance provision. R.I. GEN. LAWS section 16-19-1 (1981 & Supp. 1986). A child shall be enrolled in the school system of the town where he resides, and is deemed to be a resident of the town where his custodial parent, legal guardian or other person acting *in loco parentis* resides. An emancipated minor is a resident of the town where he lives. Children placed in group homes, in foster care, in child caring facilities, or by a Rhode Island State agency or a Rhode Island licensed child-placing agency are deemed to be residents of the town where the home or facility is located. *Id.* section 16-64-1 (Supp. 1986).

SOUTH CAROLINA

School attendance is compulsory for all children who are in the age group of five to sixteen years, inclusive. S.C. CODE ANN. section 59-63-10 (Law. Co-op. 1977 & Supp. 1986). A child within age of attendance (six to twenty-one years old) may attend the public schools of any district, without charge, provided that the child resides with her parents or legal guardian, and the parent or legal guardian with whom the child resides is a resident of the school district. *Id.* section 59-63-30 (Law. Co-op. 1977). A child who owns real estate in the district having an assessed value of three hundred dollars or more, has maintained a satisfactory scholastic record in accordance with scholastic standards of achievement prescribed by the trustees of the school district, and has not been guilty of infraction of the rules of conduct promulgated by the trustees may also attend the public schools of the school district free of charge. *Id.*

SOUTH DAKOTA

Every person between the ages of six and sixteen years inclusive is of compulsory school age. S.D. CODIFIED LAWS ANN. section 13-27-1 (1982 & Supp. 1986).

School residence for the purpose of claiming free school privileges means the legal residence of the student's parents or legal guardian. When a parent or guardian has more than one residence, the school residence is the residence where the parent or guardian is registered to vote. A student is not allowed to evade the payment of nonresident tuition by acquiring an address within the school district solely for the purpose of obtaining free school privileges. When a child is enrolled in a school district, the school residence of the child, as determined by that school district within thirty days after the enrollment, may not change during the school fiscal year unless the child ceases to be an enrolled member of a school within the district. *Id.* section 13-28-9 (1982).

A child residing in a state institution, approved group home or private child-care center which provides care and custody for children who are not living with their parents or guardian must claim the school district of his parent or guardian's residence as his school district of attendance. *Id.* section 13-28-11 (1982).

TENNESSEE

School attendance is compulsory for all children residing in the state between the ages of seven and sixteen years, both inclusive. TENN. CODE ANN. section 49-6-3001 (1983 & Supp. 1986). No fee or tuition is charged by any city or special school district except of pupils residing outside of the city or special school district. *Id.* section 49-6-3003 (1983). The local school boards are authorized at their discretion to admit pupils from outside their respective local school districts, and may require the payment of fees or tuition. *Id.* section 49-6-3104.

TEXAS

Every child between the ages of seven and sixteen is required to attend school. TEX. EDUC. CODE ANN. section 21.032 (Vernon 1987). He is permitted to attend free public schools in the district in which he resides or in which his parent, guardian or the person having lawful control over him resides at the time of the child's application for admission. *Id.* section 21.031 (Vernon 1987).

UTAH

Minors between six and eighteen years of age are required to attend a public or regularly established private school during the school year of the district in which the minor resides. UTAH CODE ANN. section 53-24-1 (1960 & Supp. 1986).

The school district of residence of a minor child whose parent or legal guardian resides or is domiciled in Utah is:

a) the school district in which the parent or guardian who has legal custody of the child is domiciled;

b) the school district in which the parent or guardian who has legal custody of the child, and with whom the child lives, resides; or

c) the school district in which the child resides: (i) while in the custody or under the supervision of a Utah state agency; (ii) while under the supervision of a private or public agency authorized to provide child placement services by the state of Utah; (iii) while living with a responsible adult resident of the district if the district board of education has determined, in accordance with policies of the State Board of Education, that the child's well-being is best served by considering him to be a resident for school purposes; or (iv) if the child is an emancipated minor.

A minor child whose parent or legal guardian neither resides nor is domiciled within the state of Utah is considered a resident of the district in which the child lives if the local board of education agrees that:

a) the child was placed and is being supervised by a private or public agency which (i) is authorized to provide residential or child placement services by the state of Utah and (ii) does not receive significant payment from any out-of-state source for services rendered to the child;

b) the child is an emancipated minor who resides within the district; or

c) the child lives with a responsible adult who is a resident of the district and is designated as the child's guardian, and (i) the child's presence in the district is not for the primary purpose of attending the public schols; and (ii) the child's well-being is best served by considering the child to be a resident for school purposes. UTAH CODE ANN. section 53-4-15 (1960 & Supp. 1986).

For the purposes of this chapter, "responsible adult" means a resident of the state who is willing and able to provide the basic necessities for the minor child. A responsible adult may obtain limited guardianship. *Id.* section 53-4-15.1 (1960 & Supp. 1986).

Children residing in one school district of the state may attend school in another district in the state if written notification is given to the board of education of the district of residence and written permission is granted by the board of education of the district in which enrollment is sought. *Id.* section 53-4-16(1) (1960 & Supp. 1986). A local board of education may require a student residing in Utah, but not within the board's district, to pay tuition in order to attend school in the district. *Id.* section 53-4-16(2) (1960 & Supp. 1986).

VERMONT

School attendance by children between the ages of seven and sixteen is required by law. VT. STAT. ANN. tit. 16, section 1121 (1974 & Supp.

1986). For the purposes of school assignment, the residence of a pupil is where the person having legal control of him resides. The board of school directors determines the pupil's residence. *Id.* tit. 16, section 1075 (1974 & Supp. 1986).

A child of legal school age (between the ages of six and eighteen years) who is not exempt from school attendance and who has not finished the elementary school course, and who is living in a district other than the place of legal residence shall, with the school board's approval, be admitted immediately to a school in the district where he is found. *Id.* tit. 16, section 1128 (1974).

VIRGIN ISLANDS

All children must commence their school education by attending an approved kindergarten from the beginning of the school year nearest their fifth birthday until the end of the school year nearest their sixteenth birthday. V.I. CODE ANN. tit. 17, section 82 (1977 & Supp. 1986).

VIRGINIA

School attendance is compulsory for every child who has reached her fifth birthday on or before September 30 of any school year and who has not passed her seventeenth birthday. VA. STAT. ANN. tit. 22.1, section 254 (1985). The public schools in each school division are free to every school-aged person who resides within the school division. A person of school age is deemed to reside in a school division when he or she is living with a natural parent, a parent by legal adoption, or when the parents of such person are dead, a person *in loco parentis*, who actually resides within the school division, or when the parents of such person are unable to care for the person and the person is living, not solely for school purposes, with another person who 1) resides in the school division and 2) is the court-appointed guardian, or has legal custody, of the person, or when the person is living in the school division not solely for school purposes, as an emancipated minor. *Id.* tit. 22.1, section 3 (1985).

WASHINGTON

School attendance is mandatory for any child eight years of age and under eighteen years of age. WASH. REV. CODE ANN. section 28A.27.010 (1982 & Supp. 1987). Education is available and free to all persons of school age (from five years to twenty-one years of age) residing in the school district. *Id.* section 28A.58.190 (1982 & Supp. 1987). Any board of directors may make arrangements with the directors of other districts for the attendance of children in the school district of either provided that such arrangements are approved by the state superintendent of public instruction and the nonresident student pay a reasonable tuition set by the superintendent of public instruction to the receiving school district. *Id.* section 28A.58.240 (1982 & Supp. 1987).

WEST VIRGINIA

Compulsory school attendance begins with the seventh birthday and continues to the sixteenth birthday. W. VA CODE section 18-8-1 (1984). Public schools are required to be maintained for all persons within the school district over the age of six and under the age of twenty-one years, and it is not essential to the right of a child to attend a public school that it should have a legal domicile in the place in which the school is located. State ex. rel. Jane Doe v. Kingery, 157 W. Va. 667 (1974).

WISCONSIN

Every child between the ages of seven and sixteen is required to attend school. WIS. STAT. ANN. section 118.5 (West 1973 & Supp. 1986). Every elementary and high school is free to all persons of school age who reside in the school district, however, a school board may admit a nonresident student, extending to the student all of the rights and privileges of resident students. The school board must charge tuition of all nonresident pupils under s.49.10. *Id.* section 121.77(1) (1973 & Supp. 1986).

WYOMING

Statutes requiring school attendance apply to all children who are residents of the state and whose seventh birthday falls on or before September 15th of any year and who have not reached their sixteenth year or completed the eighth grade. WYO. STAT. section 21-4-102 (1986). The public schools of each school district are free and accessible to all children resident in the state over six years old and under the age of twenty-one. *Id.* section 21-4-301 (1986).

These statutes were researched and compiled by P. Todd Pickens, a member of the Harvard University Law School Class of 1987.

II. RELEVANT STATUTES AND REGULATIONS

C. New York City Board of Education Regulations and Guidelines for Homeless Students

CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK

Regulation of the Chancellor

Category: STUDENTS **No.:** A-780

Subject: STUDENTS IN TEMPORARY HOUSING **Page:** 1 of 2

Issued:

ABSTRACT

The school system is the agency responsible for educating children and as such should be the chief advocate in providing and coordinating services for children residing in temporary housing. Such children should not be stigmatized because of where they live.

Continuity of instruction is of paramount importance. Accordingly, instruction is to be continued at the parent's option at a school selected by the parent in accordance with this regulation. The child should be educated in an integrated setting which is appropriate to his/her educational needs.

SERVICES

These services apply to Districts where there is a "critical mass" of students in temporary housing. Children residing in temporary shelters should receive comprehensive services throughout the school day including: wake-up calls, transporation, breakfast, lunch, dinner, extended day enrichment activities, health services, daily attendance monitoring, guidance, and recreation.

SERVICE COORDINATION

It is the responsibility of the District to fully coordinate services for these children. A comprehensive approach should be taken using all available resources. The District should engage in joint planning with community-based organizations and other City agencies to ensure integrated services.

PLACEMENT AND COUNSELING

The District should provide counseling and placement services for each individual child:

1. Whenever a student is relocated to temporary housing he/she shall be given the option of remaining in his/her previous school or the school he/she attended while residing in permanent housing.

CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK

Regulation of the Chancellor

Category: STUDENTS

No.: A-780

Subject: STUDENTS IN TEMPORARY HOUSING

Page: 2 of 2

Issued:

2. If the student chooses to accept a local placement in the new district, the district shall place the student in the school to which the temporary residence is zoned.
3. Notwithstanding the above, if a student's needs indicate placement in a special program (i.e., Gifted and Talented, Bilingual Program) the district is to place the student in an appropriate program which provides the indicated instructional services.
4. Students should be integrated in classes and school programs.
5. Exceptions to numbers 2-4 above must be approved by the Chancellor's office.
6. Regulations for children in Special Education are in effect for Special Education children in temporary housing.

EDUCATIONAL SERVICES

Districts with a "critical mass" of students in temporary housing should plan for expanded educational services which might include:

- Twelve Month Year
- Extended school day (with dinner)
- Smaller class size or adult/child ratio
- Multi-service room at the school

ROLE OF CENTRAL HEADQUARTERS

1. A Central ombudsman who oversees implementation of the regulation and provides citywide coordination of services
2. Central coordination with City agencies and community-based organizations
3. Approval of District Program Plans
4. Attendance Services
5. Access to Records
6. Food Services
7. Transportation
8. Monitoring

Should you have any questions regarding this regulation, telephone the Offfice of Ombudsman for Services for Students in Temporary Housing at (718) 935-3773.

BOARD OF EDUCATION OF THE CITY OF NEW YORK
110 LIVINGSTON STREET, BROOKLYN, NEW YORK 11201
OFFICE OF THE CHANCELLOR

GUIDELINES FOR STUDENTS IN TEMPORARY HOUSING

PHILOSOPHY

The school system is the agency responsible for educating children and as such should be the chief advocate in providing and coordinating services for children residing in temporary housing. Continuity of instruction is of paramount importance and must be maintained. Instruction is to be continued, at the parent's option, in the child's home school. Where this is not the case, the child should be educated in an integrated setting which is appropriate to his/her educational needs. Children should not be stigmatized because of where they live.

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These services apply to Districts where there is a "critical mass" of students in temporary housing. Children residing in temporary shelters should receive comprehensive services throughout the school day including: wake-up calls, transporation, breakfast, lunch, dinner, extended day enrichment activities, health services, daily attendance monitoring, guidance, and recreation.

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1. Students should be given the option to remain in previous or home school.
2. If a student's needs indicate placement in a special program (i.e. Gifted and Talented, Bilingual Program), the student is to be placed in an appropriate program which provides the indicated instructional services.
3. Students should be placed in their zoned school.
4. Students should be integrated in classes and school programs.
5. Exceptions to numbers 2-4 above must be approved by the Chancellor's office.
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ROLE OF CENTRAL HEADQUARTERS

1. Issuance of citywide guidelines
2. A Central ombudsman who oversees implementation of the guidelines and provides citywide coordination of services
3. Central coordination with city agencies and community-based organizations
4. Approval of District Program Plans
5. Attendance Services
6. Access to Records
7. Food Services
8. Transportation
9. Monitoring

II. RELEVANT STATUTES AND REGULATIONS

D. New York State Education Department Regulations for the Education of Homeless Children (May, 1988)

NEW YORK STATE DEPARTMENT OF EDUCATION REGULATIONS REGARDING THE EDUCATION OF HOMELESS CHILDREN

Note: These regulations were adopted by the New York State Department of Education in May, 1988. Under the regulations, the parents of homeless children are entitled to choose whether their child will be enrolled in either the school district in which the child last attended school, or the district in which the child's shelter or other temporary housing is located. Although school districts are not required to provide transportation to and from school for children residing outside the district, the school transportation needs of New York homeless children are met by local social services districts. According to state policy, social services districts are required to pay the actual school transportation costs of all homeless students.

AMENDMENT TO REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 207, 305, 3202 and 3205 of the Education Law: Section 100.2 of the Regulations of the Commissioner of Education is amended, effective July 8, 1988, by the addition of a new subdivision (x) to read as follows:

(x) Education of homeless children. (1) As used in this subdivision:

(i) Homeless child means a child entitled to attend school in the State of New York who, because of the unavailability of permanent housing, is living in a hotel, motel, shelter, or other temporary living arrangement in a situation in which the child or his or her family is receiving assistance and/or services from a local social services district, provided that the definition of homeless child shall exclude a child who has been placed by a court with, or whose custody has been transferred to, an authorized agency, as defined in subdivision 10 of section 371 of the Social Services Law, or the Division for Youth.

(ii) School district of last attendance means the school district within the State of New York in which the homeless child was attending a public school on a tuition-free basis when circumstances arose which caused such child to become homeless, or if not so attending, the school district in which the homeless child was entitled to attend school, or would have been entitled to attend school upon reaching school age.

(iii) School district of current location means the school district within the State of New York in which the hotel, motel, shelter, or other temporary housing arrangement of a homeless child is located.

(2) The parent of or person in parental relation to a homeless child, or the homeless child if no parent or person in parental relation is available, may designate either the school district of current location or the school district of last attendance as the district in which such child shall attend upon instruction.

(i) Such designation shall be made on a form specified by the commissioner within a reasonable time after the child enters a new temporary housing arrangement, and except as otherwise provided in subparagraph (ii) of this paragraph, shall remain in effect for so long as such child remains in such temporary housing arrangement.

(ii) Prior to the end of the first semester of attendance or within sixty days of commencing attendance at a school pursuant to a designation made in accordance with this paragraph or in accordance with the provision of paragraph (5) of this subdivision, whichever occurs later, the parent, person in parental relation, or child, as appropriate, may change the designation to the district of current location or to the district of last attendance, or, if applicable in accordance with paragraph (5) of this subdivision, to a school district participating in a regional placement plan, if the parent, person in parental relation or child finds the original designation to be educationally unsound.

(3) Whether a homeless child attends school in the district of current location, in the district of last attendance, or, if applicable in accordance with paragraph (5) of this subdivision, in a school district participating in regional placement plan, such child shall be considered as a resident of such district for all purposes, provided that nothing herein shall be construed to require the board of education of the school district of last attendance or of a school district providing services pursuant to a regional placement plan to transport a child from a location outside such district to the school the child attends within such district.

(4) The parent of or person in parental relation to a homeless child in a temporary housing arrangement as of the effective date of this subdivision, or the homeless child if no parent or person in parental relation is available, shall be entitled to designate either the school district of temporary location or the school district of last attendance as the school district the child will attend, provided that the parent, person in parental relation, or child, as appropriate, so notifies the school authorities of such district no later than August 1, 1988 or upon moving to a new temporary housing arrangement. In the event the parent, person in parental relation, or child, as appropriate, fails to designate the district the child will attend by August 1, 1988, such parent, person in parental relation, or child may make such designation within the sixty day period set forth in subparagraph (ii) of paragraph (2) of this subdivision, in which case such parent, person in parental relation, or child may not again change the designation in accordance with such paragraph.

(5) In addition to the options set forth in paragraph (2) of this subdivision, the parent of or person in parental relation to a homeless child, or the homeless child if no parent or person in parental relation is available, may voluntarily enroll the child, in accordance with a regional placement plan approved by the commissioner, in a public school of any school district participating in the regional placement plan.

(i) A regional placement plan shall be submitted on behalf of all school districts participating in the plan by at least one such school district or by at least one board of cooperative educational services serving such districts, and shall be accompanied by copies of the resolutions of the boards of education of each school district participating in the plan authorizing the participation of such school districts.

(ii) In order to qualify for approval by the commissioner, a regional placement plan shall provide a comprehensive regional approach to the provision of educational placements for homeless children. Each such plan shall contain all information specified by the commissioner.

III. CASES AND PLEADINGS

A. Decided Cases

1. Richards v. Board of Education of Union Free School District No. 4

Appeal of MARY RICHARDS, on behalf of ELAINE and DAVID WILLIS, from action of the Board of Education of the Port Chester-Rye Union Free School District; Harry H. Mix, superintendent; Anthony Napoli, high school principal; and Richard De Buono, middle school principal, regarding admission to school.

Decision No. 11,490

(July 17, 1985)

Westchester Legal Services, Inc. and Westchester Student Advocacy Coalition, attorneys for petitioner, Jerrold M. Levy, Esq., Gerald A. Norlander, Esq., and Karen Norlander, Esq., of counsel

Francis J. Sisca, Esq., attorney for respondents

AMBACH, Commissioner.–Petitioner appeals from respondents' refusal to allow her children to attend the schools of the Port Chester-Rye Union Free School District and seeks an order annulling that determination and directing respondent to provide her children with compensatory education for the time they were excluded from school. The appeal must be sustained in part.

Petitioner and her children have been intermittent residents of respondent district, having moved in and out of the district several times. In the spring of 1984, petitioner and her children moved out of their apartment in the Port Chester-Rye Union Free School District because of the hazardous and substandard conditions of that apartment. Since that time, petitioner and her children have been homeless and have been provided with emergency housing by the Westchester County Department of Social Services in seven different locations (including six different motels) throughout Westchester County.

In September and October 1984, respectively, petitioner's daughter and son were excluded from respondent board's high school and middle school based on the conclusion of the superintendent that they were no longer residents of the district. In December 1984, petitioner commenced an action in the United States District Court for the Southern District of New York against the Commissioner of Education as well as against respondents in this appeal. Pursuant to a stipulation between petitioner and the local defendants in that action, petitioner's children were readmitted to their schools in the Port Chester-Rye Union Free School District on December 17, 1984, pending a determination of this appeal.

Before reviewing the merits of this appeal, it is necessary to address several procedural issues. Respondents contend that this appeal should be dismissed as untimely, since it was not commenced within 30 days of the decision complained of, as required by Regulations of the Commissioner of Education §275.16. Respondents allege that petitioner had been advised at the beginning of the 1984-85 school year that her children would be excluded from school based on their lack of residency in the district, but petitioner did not commence this appeal until February 19, 1985.

If petitioner's children are found to be residents of the Port Chester-Rye Union Free School District, they have the right to attend the schools of that district until they obtain a diploma or reach the age of 21 years (Educ L §3202(1)). As residents, they would be entitled to enroll in the schools of the district at any time during the school year, and, upon a denial of such enrollment, petitioner could bring an appeal to the Commissioner. In addition, the stipulation entered into between petitioner and respondents in connection with petitioner's action brought in the United States District Court for the Southern District of New York provided that an appeal to the Commissioner of Education would be brought by petitioner for a determination on the issue of residency. Under such circumstances and in light of the fact that there is no showing that the delay has resulted in any prejudice to respondents, I will excuse petitioner's failure to commence this appeal within 30 days of the dates upon which she was first informed that her children would not be admitted to school (*Matter of Takeall*, 23 Ed Dept Rep 475 (1984).

Petitioner has requested that a declaratory ruling be issued pursuant to State Administrative Procedure Act §204 that any student who becomes homeless and is placed in emergency living quarters in another school district continues to be a resident of the school district in which he attended at the time he became homeless. State Administrative Procedure Act §204 provides in pertinent part as follows:

> On petition of any person, any agency *may* issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it. [emphasis added]

Whether to adopt a procedure for the issuance of declaratory rulings is within the discretion of the agency (see also SAPA §205), and the State Education Department has not chosen to issue such declaratory rulings.

Moreover, it is not possible to declare in a single ruling the rights of all homeless students placed in temporary housing. The Legislature has not passed legislation specifically addressing the educational rights of such students. In the absence of such legislation, each student has the right to attend school in his or her school district of residence (Educ L §3202(1)). Determinations of residency are mixed questions of law and fact which do not lend themselves to general declarations. Rather, each circumstance must be reviewed individually to determine the student's residence. Nor do policy considerations lead inevitably to a conclusion that all homeless students should be required to return to the district in which they resided at the time they became homeless. In certain circumstances, such students are placed in temporary housing a great distance from their prior home, rendering transportation to that district both impractical and undesirable. Unless and until legislation is enacted specifically addressing the education of homeless children, the residence of such children must be determined on a case-by-case basis.

Petitioner has also requested that a full evidentiary hearing concerning the disputed facts of this appeal be held pursuant to State Administrative Procedure Act §301. However, the provisions of that statute apply only to proceedings in which a determination is required by law to be made only after an opportunity for a hearing (SAPA §102(3)). The jurisdiction of the Commissioner of Education in proceedings such as the instant matter is appellate in nature, and there is no requirement in statute or regulation mandating that an evidentiary hearing be held (*Matter of Forrest v. Ambach et al.*, 93 AD2d 965, 463 NYS2d 84 (1983)).

Concerning the merits of this appeal, petitioner contends that, pursuant to Education Law §3202, respondent board must continue to educate her children, since they remain residents of the district. Petitioner further contends that her temporary homelessness and placement in emergency housing outside the boundaries of the school district do not automatically extinguish her residency in the district. In support of those contentions, petitioner alleges that her primary community ties are in respondent district, in that every week she is required to report to the Department of Social Services located within that district for an emergency housing placement, and requests on each such occasion that she be assisted in finding permanent or emergency housing in the district. Petitioner also maintains that she has diligently attempted to locate housing for herself in the district; spends all her time in Port Chester, returning to whatever motel she is placed in only to sleep; has submitted a housing application with the Port Chester Housing Authority; has received a certificate from a federal housing subsidy program for housing in Port Chester; has her mailing address in Port Chester; has extensive family in Port Chester; and attends church in Port Chester.

Petitioner further contends that she has always expressed her intent to maintain her residency in Port Chester and has not indicated in any way an intent to change her residence to any of the school districts where the motels in which she and her children have been placed are located. She further maintains that the motel placements are temporary and do not indicate an intent to establish residence in the school districts in which such motels are located.

Respondents contend that, pursuant to Education Law §3202, respondent board is obligated to educate only those persons who are residents of the district and that petitioner and her children are no longer residents of the district and not entitled to be educated in its schools without the payment of tuition. Respondents further contend that the education of persons who are not residents of the district, such as petitioner's children, places an undue financial burden on the district and that, since the Westchester County Department of Social Services has assumed the responsibility of placing petitioner and her children in temporary housing throughout Westchester County, that department should also assume the cost of tuition for petitioner's children.

Education Law §3202(1) provides in part: "A person over five and under twenty-one years of age who has not received a high school diploma is entitled to attend the public schools maintained in the district in which such person resides without the payment of tuition." The purpose of that statute is to limit the obligation of school districts to provide tuition-free education, with exceptions not relevant here, to students whose parents or legal guardians reside within the district (*Matter of Bd. of Ed. v. Allen et al.*, 29 AD2d 24, 28, 285 NYS2d 487 (1967). As was stated in *Matter of Conine* (9 Ed Dept Rep 32, 33 (1969):

> The general rule established by Education Law §3202 is clearly indicated in the heading of that section: "Public schools free to resident pupils; tuition from nonresident pupils." The Legislature recognized that under certain circumstances exceptions should be made to this rule. But, unless appellant proves that the children are residents of respondent school district or come within one of the excep-

tions to the general rule, they are not entitled to free tuition in this district.

It is well settled that a residence is not lost until another residence is established through both intent and action expressing such intent (*Matter of Wadas*, 21 Ed Dept Rep 577 (1982); *Matter of Lundborg*, 12 *id.* 268 (1973); *Matter of Callahan*, 10 *id.* 66 (1970). The record before me indicates that petitioner was required to leave her home because of circumstances beyond her control. Petitioner has not expressed or implied any intention of abandoning her residence in the district or any intention of establishing a residence in another district. Until such an intent is expressed or can be inferred from her actions, petitioner and her children have not lost their status as residents of the Port Chester-Rye Union Free School District. Petitioner and her children are currently homeless, and their present living arrangement in a motel is temporary. Temporary absence does not constitute the establishment of a residence in the district where the temporary abode is located or the abandonment of a permanent residence (*Matter of Hodge*, 27 St Dept Rep 690). Consequently, I find that petitioner is currently a resident of respondent district, and her children are entitled to attend its schools on a tuition-free basis.

Petitioner also requests an order requiring respondents to provide her children with compensatory education to make up for the time they have been excluded from school attendance. Petitioner does not suggest the manner in which such compensatory education might be provided. As noted in *Takeall* (*supra*), a board of education is under no obligation to provide compensatory summer school instruction. Petitioner has failed to establish any legal or factual basis upon which any other form of compensatory education could be ordered.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that respondents admit Elaine Willis and David Willis to the schools of the Port Chester-Rye Union Free School District without payment of tuition.

DEPARTMENT OF EDUCATION
STATE OF NEW YORK

MARY RICHARDS, on behalf of herself and
her minor children,
ELAINE WILLIS and DAVID WILLIS,

Petitioner,

-against-

BOARD OF EDUCATION OF UNION FREE SCHOOL
DISTRICT NUMBER FOUR, Town of Rye,
Westchester County, New York;

HARRY H. MIX, as Superintendent of the
Port Chester Schools, Union Free
School District Number Four;

ANTHONY NAPOLI, as Principal of the
Port Chester High School; and

RICHARD DE BUONO, as Principal of
the Port Chester Middle School,

Respondents.

PETITIONER'S BRIEF

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PRELIMINARY STATEMENT

This proceeding is brought pursuant to §310 of the New York Education Law and the Regulations of the New York State Commissioner of Education, 8 NYCRR §§275, 276, to review the respondents'[1] decision to exclude petitioner Mary Richards' children from continued attendance at the Port Chester Schools on the ground of alleged non-residency. Petitioner and her children are "homeless" recipients of public assistance who have been lodged by the Westchester County Department of Social Services in emergency housing accommodations, including hotels and motels outside the respondents' school district.

The respondent school officials determined in September and October of 1984 that the petitioner Mary Richards and two of her school age children, Elaine and David Willis, no longer were residents of their district. As a result, Elaine was excluded from the ninth grade of the Port Chester High School in September, 1984, and David was excluded from the Port Chester Middle School in October, 1984.

At no time was petitioner Richards given adequate, detailed written notice of the factual and legal basis for the determination nor was she afforded notice of an opportunity for a hearing prior to the exclusion. On December 7, 1984, petitioner commenced an action in the United States District Court, Southern District of New York, pursuant to 42 U.S.C. 1983, alleging, inter alia, that the respondents' failure to provide detailed notice in writing of the non-residency determinations and an opportunity for a hearing on the issue of residency prior to the termination of instruction was in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[2] In the federal action, the parties to this proceeding stipulated to readmit the petitioner's children to the Port Chester Schools pending a decision by the Commissioner pursuant to Section 310 of the Education Law on the residency of the petitioners.[3] The stipulation is without prejudice to the respondents' contention that petitioner is not a resident; it is also without prejudice to petitioner's contentions that termination of instruction should not have occurred without adequate written notice and an opportunity for a prior hearing, and that the Commissioner's §310 proceeding, because of its timing and the procedural burden placed on petitioner, did not provide a meaningful opportunity for a hearing prior to the termination.[4] Petitioner expressly reserves her federal claims for determination by the federal court.

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[1] The respondents are the Board of Education of Union Free School District Number 4, Rye Neck, New York; Henry H. Mix, Superintendent of the Port Chester Schools; Anthony Napoli, Principal of the Port Chester High School; and Richard De Buono, Principal of the Port Chester Middle School.

The central issue presented in this proceeding is whether children of a school district who become "homeless," and are lodged outside the school district in emergency housing by the Department of Social Services, continue to be entitled to attend the district's schools. This brief is respectfully submitted in support of petitioner's claim that, despite her family's current "homelessness," she and her children continue to be residents of Port Chester entitled under Section 3202 of the New York Education Law to attend the respondents' schools without the payment of tuition.

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[2] Richards v. Ambach, (S.D.N.Y. 84 Civ. 8806 (LPG)).

[3] The stipulation, "so ordered" by the federal court on January 11, 1985, is annexed to this brief as Appendix "A."

[4] See Hall v. Ohla, ___ F.Supp. ___, 18 Clearinghouse Review 167, No. 36,367 (D. Conn. No. B-80-407, Feb. 24, 1984) (Alleged nonresident students entitled to pre-expulsion notice and hearing).

FACTS

Petitioner Mary Richards is the mother of Elaine and David Willis, aged 15 and 14, respectively.[5] In the Spring of 1984, Elaine completed the eighth grade in the respondents' Middle School. David, a handicapped child in an ungraded curriculum, also completed his school year at the Middle School.[6] It is undisputed that the petitioner and her children were residents of the respondents' school district at that time.

In the spring of 1984, petitioner and her children were residing at 78 Purdy Avenue, Port Chester, New York. At that time it became necessary for them to leave the apartment because of hazardous and substandard conditions. As a result of the loss of the apartment, petitioner and her family became homeless.[7]

Since that time, they have been lodged temporarily by the Westchester County Department of Social Services at the following locations:

a) an emergency shelter for homeless people in Port Chester;

b) the Sheraton Hotel in New Rochelle, New York;

c) the Peekskill Motor Inn in Peekskill, New York;

d) White Plains Valley Inn in White Plains, New York;

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[5] *Verified Petition*, §4.
[6] *Verified Petition*, §§9, 13.
[7] *Verified Petition*, §19.

e) the Mamaroneck Motel in Mamaroneck, New York;

f) the Larchmont Motel in Larchmont, New York;

g) the Elmsford Motel in Elmsford, New York.[8]

Since the 1984-85 school year began, petitioner and her children have been lodged in six hotels and motels in five different school districts.[9]

In early September, 1984, petitioner went to the Port Chester High School to enroll her daughter Elaine in the ninth grade. Elaine had finished the Middle School in June, and it would have been her first day of high school. Petitioner had received a bus pass in the mail for transportation for Elaine. While attempting to enroll for classes at the high school, petitioner was told by respondent Napoli, the high school principal, that Elaine could not attend because she was no longer a resident of Port Chester. Petitioner was not given any notice in writing of this determination by the principal. Nor was petitioner advised of the school district in which she resided.[10] As a result of the determination and respondent Napoli's refusal to admit her, Elaine could not attend high school, even though she is under sixteen years of age, is not a high school graduate, and is subject to the compulsory education law.[11]

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[8] Verified Petition, §20.

[9] Verified Petition, §26. There are more than forty school districts in close proximity in Westchester County.

[10] Verified Petition, §§ 10,11.

[11] Verified Petition, §12. See N.Y. Education Law §3205(1).

Petitioner's son David began the Fall 1984 term at the Port Chester Middle School. David is a student with handicapping conditions and the Port Chester Committee on the Handicapped had developed a special educational program for him. In September, petitioner was advised orally by the Middle School principal, respondent De Buono, that there was a question regarding residency because petitioner's family was living outside the school district at the Larchmont Motel.[12] Petitioner asked her caseworker at the Westchester County Department of Social Services to assist her in clarifying the questions raised by the school district regarding her residency. In response to that request, the caseworker wrote a letter dated September 21, 1984 to respondent Mix explaining the temporary and emergency nature of petitioner's placement in different communities outside the school district, detailing petitioner's ties to Port Chester and explaining that the Westchester County Department of Social Services authorized cab fare specifically to ensure that the children's education in Port Chester would not be interrupted by their housing crisis.[13] David attended school until Friday, October 19, 1984 when petitioner received a letter from respondent Mix on that date in which he stated:

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[12] Verified Petition, §§13, 14.

[13] Verified Petition §15. A copy of the September 21, 1984 letter from the caseworker to respondent Mix is attached to this brief as Appendix "B."

> "[b]ecause you are not a permanent resident of Port Chester, it will not be possible for David to continue his schooling in Port Chester....Effective Monday, October 22, 1984, it will be necessary for you to register your child in the school district in which you presently reside."[14]

Thus Elaine and David were expelled from respondents' schools for alleged non-residency, and as a result could not attend school. Petitioner maintains she is still a resident of Port Chester; that her children should continue to be educated in the Port Chester schools because she has not abandoned her Port Chester residency during her family's temporary "homelessness;" that she has not established a new residence during her family's sojourns outside the district in emergency housing accommodations provided by the Westchester County Department of Social Services, and that respondents have failed to prove by clear and convincing evidence that she has established a residence elsewhere.

The evidence concerning petitioner's continued residency in Port Chester includes the following:

I. Petitioner has steadfastly maintained that Port Chester is her home.

Petitioner and her children spend all their time in Port Chester except for sleeping in the motel. They do all their shopping in Port Chester and receive their mail there. Petitioner continues to be a member of her church in Port Chester.[15]

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[14] Verified Petition, §16. A copy of the letter from Superintendent Mix is attached to this brief as Appendix "C". The Superintendent did not make a finding that petitioner had established a new residence in any particular district, nor did he state the factual and legal basis for his decision, nor did he give written notice to petitioner of any opportunity for a hearing prior to David's expulsion.

II. Petitioner steadfastly maintains that her intent is to continue to remain a resident of Port Chester.

Petitioner continues diligently to search for permanent housing in Port Chester. She has a pending housing application with the Port Chester Housing Authority and has secured a Section 8 certificate (a federal housing subsidy program) for Port Chester.[16] Additionally, petitioner arranged for transportation with the Westchester County Department of Social Services to ensure that her children continued to attend school in Port Chester.[17]

III. Petitioner's presence in motels and other emergency accommodations do not establish a new residence.

-Since petitioner became homeless she has stayed in six different hotels and motels and an emergency shelter in seven different communities.[18]

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[15] Verified Petition, §§31, 32, 36, 37, 38, 39,41. When respondent Mix notified petitioner of the decision to expel David for non-residency, he sent the letter to petitioner at the Port Chester address of a relative. See Exhibit "C" to Verified Petition.

[16] Verified Petition, 32,33,34,35.

[17] Verified Petition, §15.

[18] Verified Petition, §§ 20, 26.

-The physical characteristics of the motels and hotels do not evidence a homelike atmosphere.[19]

-There are no cooking facilities.[20]

-There is no room in the motel to store the family's clothing and personal possessions.[21]

-The cost of the motel is approximately $2,400 per month, which is paid by the Department of Social Services.[22]

Petitioner's situation is not unique. In Westchester County, the Department of Social Services provided emergency housing in 1984 to 2,629 homeless families.[23] In the Fall of 1984, at the time that petitioner's children were expelled for non-residency, the Westchester County Department of Social Services was housing 340 families with 697 children in emergency accommodations.[24] Homeless school aged children in Westchester County, temporarily placed outside their school districts thus are faced with the threat of expulsion from their home school districts due to the district's allegations of non-residency.[25]

At the present time, "[t]he department [Westchester County

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[19] Verified Petition, §24.
[20] Id.
[21] Id.
[22] Verified Petition, §23. In contrast, the ordinary monthly rent allowance for a heated apartment in Westchester County for petitioner's family would be $301. 18 NYCRR Part 352.3.
[23] "Workers With the Homeless Call Shelters a Poor Stop Gap," N.Y. Times, Westchester Section, Dec. 16, 1984. A copy of this article is attached to this brief as Appendix D.
[24] Letter from Mary Glass, Director of Income Maintenance, Westchester County Department of Social Services, dated January 16, 1985. A copy of the letter is attached to this brief as Appendix "E".
[25] See Affirmation of Karen Norlander in support of Verified Petition.

Department of Social Services] puts up about 1,000 people each night in shelters, motels, hotels and apartments that are available on a temporary basis."[26]

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[26] "In the Dead of Winter, Decent Apartments at Affordable Prices are Nearly Impossible to Find." Gannett Westchester Newpapers, February 6, 1985.

ARGUMENT

POINT I

PETITIONER CONTINUES TO BE A RESIDENT OF RESPONDENTS' SCHOOL DISTRICT AND HER CHILDREN ARE ENTITLED TO ATTEND ITS SCHOOLS UNDER SECTION 3202 OF THE EDUCATION LAW, DESPITE THEIR TEMPORARY "HOMELESSNESS," BECAUSE SHE DID NOT ABANDON HER PORT CHESTER RESIDENCY, AND BECAUSE RESPONDENTS FAILED TO SHOW THAT SHE ESTABLISHED A RESIDENCE ELSEWHERE

Petitioner contends that respondents' school district has the responsibility under Section 3202 of the New York Education Law to continue to educate her children because she remains a legal resident of the district. Her family's temporary "homelessness" and placement in emergency housing outside the boundaries of the school district do not automatically extinguish their residency in respondents' district, and respondents have not met their burden of proving that she established a new residence elsewhere.

The central issue in this appeal is which of several school districts has the responsibility to educate petitioner's children. Is it the school district in which they were attending school when they became homeless? Or, is it the school district in which they happen to be temporarily lodged at the time? Consideration of traditional principles of residency, state policy, sound educational policy and the best interests of children all lead to the conclusion that the district in which the children last attended school continues to have the legal responsibility to educate them.

The residency standard for admission to the public schools is set forth in the Education Law as follows:

> A person over five and under twenty one years of age is entitled to attend the public school maintained in the district in which such person resides without the payment of tuition. N.Y. Education Law §3202(1).[27]

Both Elaine and David are subject to the compulsory education law, which contains a parallel residency requirement: every minor between six and sixteen years of age must "attend [school] regularly as prescribed **where he resides**...." N.Y. Education Law, §3210(1). [Emphasis added].[28]

In Matter of Galick, 37 St. Dept. Rep. 15, 17 (1927), the Commissioner defined residence as a "fixed and permanent abode" as distinguished from "a mere temporary locality of existence." It is undisputed that at the time petitioner became homeless her "fixed and permanent abode" was Port Chester, New York, and her children were attending the schools in the respondents' school district.

To determine which school district is responsible for educating petitioner's children, the inquiry must focus on whether petitioner abandoned her residency in Port Chester and established another residence elsewhere since the time she and her family became "homeless." See, Matter of Hodge, 27 St. Dept. Rep. 690, 692 (1922); Matter of Buglione, 14 Ed. Dept. Rep. 220, 223 (1975).

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[27] This legislation implements the right to an education that is guaranteed to the petitioner's children under the State Constitution, which provides for "the maintenance and support of a system of free, common schools, wherein **all** the children of this state may be educated." N.Y. Constitution Art XI. (Emphasis added).

[28] The residence of children living with a parent is that of the parent. Cf., Matter of Takeall, 23 Ed. Dept. Rep. (No. 11286, June 1, 1984); Matter of Staulcup, 20 Ed. Dept. Rep. 11 (1980); Matter of Tiger, 16 Ed. Dept. Rep. 178 (1977).

To make these determinations whether residency has been abandoned and a new one gained in another district, the Commissioner has applied the following tests:

-- **Community contacts:** Does the person maintain "sufficient actual contacts" in the district in which he claims residency? Matter of Stewart, 21 Ed. Dept. Rep. 160, 162 (1981); Matter of Takeall, 23 Ed. Dept. Rep. (No. 11286, June 1, 1984); Matter of Lundborg, 12 Ed. Dept. Rep. 268 (1973).

-- **Nature of Abode:** Is the location where the person is currently living of a permanent nature, or is it merely a "temporary locality of existence"? Matter of Galick, 37 St. Dept. Rep. 15, 17 (1927); Matter of Van Curran, 18 Ed. Dept. Rep. 523, 524 (1979).

-- **Express intent:** What is the individual's expressed "intent or desire?" Matter of Handicapped Individual, 20 Ed. Dept. Rep. 453, 454 (1981). Does the person state an intention to make the location where he is living a home, a fixed and permanent abode? Matter of Galick, supra. Matter of Wadas, 21 Ed. Dept. Rep. 577, 579 (1982).

-- **Reason for being outside the school district:** For what purpose is the person residing at the present location? Matter of Buglione, 14 Ed. Dept. Rep. 220, 223 (1975); Matter of Fitchner, 22 Ed. Dept. Rep. 119, 120 (1982).

Furthermore, in making residency decisions, physical presence or absence from the school district is not determinative. Mere physical presence in a school district does not necessarily mean that one is a resident there.[29] As the Commissioner observed:

> "[From the fact that a person establishes] living quarters for herself and her children at [a] new address, it does not follow that she has established a new legal domicile there...." Matter of Fenton 15 Ed. Dept. Rep. 101, 103 (1975).

Similarly, physical absence from a district does not necessarily mean that one's residency there has been abandoned. As the Commissioner stated:

> Temporary absence from a district ... does not... constitute the establishment of a residence in the district [of temporary abode]. Matter of Hodge, 27 St. Dept. Rep. 690, 692 (1922).

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[29] For a college student to establish residence at a dormitory in order to register to vote, the Court of Appeals held that "...physical presence, without more, naturally and by constitutional mandate...is deemed evidence merely of an intention to reside temporarily...." Palla v. Suffolk Co. Board of Elections, 31 N.Y.2d 36, 47-48. At the same time, the Court emphasized that it is possible for the student to establish a new residence in the college community but "...the intention to change [residence] is not alone sufficient. It must exist, but must concur with and be manifested by resultant acts which are independent of the presence as a student in the new locality....." Palla v. Suffolk County Board of Elections, Id. citing Matter of Goodman, 146 N.Y. 284, 288, (1895). "Mere change of residence although continued for a long time does not effect a change of domicile.... There must be a present, definite and honest purpose to give up the old and take up the new place...." Matter of Newcomb, 192 N.Y. 238, 250-251 (1908).

A.

Petitioner's Continued Community Contacts, Express Intent, The Reasons for her "Homelessness," And the Temporary Nature of Her Emergency Housing Outside the District Demonstrate That She Neither Abandoned Her Port Chester Residency Nor Established a New Residence in Any Other District

1. Petitioner Did Not Abandon Residency in Port Chester

When the facts of this case are examined in light of the tests set forth above, there is no evidence that petitioner abandoned her residency in Port Chester when she became homeless and was lodged outside the district in emergency housing at the expense of the Department of Social Services. In fact, every indicator points to the contrary conclusion.

a. Petitioner continues to maintain sufficient community ties in respondent's school district.

Notwithstanding the loss of her apartment, petitioner and her children's primary ties remain in the Port Chester community. Petitioner returns to Port Chester regularly in search of permanent housing. She continues to do her marketing there, receives mail there, continues to be a member of her church there, and visits family and friends there almost daily. Petitioner's waking hours usually are spent in Port Chester, while the motel room merely provides her, her children and her grandchild with beds in which to sleep each night and shelter from the elements.

As a recipient of public assistance, the petitioner does not have the typical documentary indicators of residence, such as motor vehicle registration, driver's license, lease, title to real property, but the qualitative nature of her continued contacts with the Port Chester community is much stronger and more indicative of residence than such documentation, which can easily be obtained by persons of financial means. Her continued community ties to Port Chester militate against any finding that she intended to abandon her residency during her housing crisis. Thus petitioner has demonstrated "sufficient actual contacts," Matter of Stewart, 21 Ed. Dept. Rep. 160, 162 (1981), to show that she remains a Port Chester resident. Matter of Takeall, 23 Ed. Dept. Rep. (No. 11286, June 1, 1984).

b. Petitioner's express intent is to continue to remain a resident of Port Chester.

Petitioner's consistent, stated intention is to remain a resident of Port Chester. While not always determinative of residency, the stated intention of an individual is clearly relevant. See, Matter of Callahan, 10 Ed. Dept. Rep. 66, 67 (1970)(person "stated" he was maintaining a residence). Petitioner's intention to remain in Port Chester is demonstrated by her continuous search for housing there. Her intent is also exemplified by the fact that she immediately sought the assistance of the Westchester County Department of Social Services to provide transportation to ensure that her children continued to attend school in Port Chester. In addition, she obtained the assistance of the Department of Social Services when David's residency was challenged by the Port Chester officials in September, 1984. These efforts were frustrated only by respondents, who refused to admit Elaine to the high school and later expelled David for alleged non-residency.

2. The Placement of Petitioner's Homeless Family in Emergency Housing Accommodations Does Not Establish A New Residence

Because "a residence once established is deemed to continue until another residence is gained," Matter of Hodge, 27 St. Dept. Rep. 691, 692 (1922), it is also necessary to consider whether petitioner established residency elsewhere.

a. Petitioner's case demonstrates no intent to establish a new residence.

Petitioner never established another residence "through intent [or] action expressing such intent." Matter of Callahan, 10 Ed. Dept. Rep. 66, 67 (1970); Matter of Stewart, 21 Ed. Dept. Rep. 160, 162, citing Matter of Gladwin v. Power, 21 AD2d 665, aff'd, 14 N.Y.2d 771 (1964). After petitioner was forced to leave her apartment in Port Chester due to substandard, hazardous conditions, that made it uninhabitable, she and her family have been lodged in an emergency shelter in Port Chester and in six different hotels and motels in at least five different school districts. An emergency shelter or a motel room intended for the placement of the homeless is temporary by its very nature. To suggest that a homeless family's placement in a motel room or emergency shelter automatically creates a residence there, is anomalous. The motel is a "mere temporary locality of existence," Matter of Galick, 37 St. Dept. Rep. 15, 17 (1927) which hardly can be characterized as a "fixed and permanent abode," ibid.[30]

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[30] The monthly rental at the current motel is $2400 as opposed to her rental allowance from the Westchester County Department of Social Services of $301 per month. 18 NYCRR §352.3.

Any assertion by respondents that petitioner became a resident of any of the school districts where they were temporarily housed in motel rooms is unsupported by the facts of this case.[31]

b. The nature of the abode and petitioner's reason for being there demonstrate no intent to establish residency where the emergency housing accommodations are located.

The life of petitioner's family in bleak hotel and motel rooms hardly can be considered the making of a new home, a legal residence consistent with the principle that "[a] home is a dwelling place of a person, distinguished from other dwelling-places of that person by the intimacy of the relationship between the person and the place...." Texas v Florida, 306 U.S.398, 413 (1938) citing Restatement of Conflict of Laws, §13. Because the motel room merely provides a place to sleep for this "homeless" family and nothing more,[32] there has been no act or intention on the part of petitioner to establish a new residence since she lost her housing in Port Chester.[33]

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[31] Cf., Vaughn v. Board of Education, 64 M.2d 60 (Sup. Ct. Nassau Co. 1970). The Vaughn petitioners were living in the housing quarters of a former air force base, with no intent to reside elsewhere. They "had no other residence," id., at 62.

[32] For a description of motel life for public assistance families in Westchester County, see "Nomads of Westchester, Gannett Westchester Newspapers, May 23, 1983, and "Motel Life is Hell," Gannett Westchester Newspapers, January 6, 1985.

3. Mere Lack of An Address in Port Chester Does Not Necessarily Mean That Petitioner Has Abandoned Port Chester to Establish a Permanent Residence in Another District

Respondents' contention that petitioner is no longer a resident of their school district appears to have been based on the fact that petitioner cannot point to a present address of her own there. However, the lack of a specific address in Port Chester cannot be controlling in reaching a decision that petitioner is no longer a resident. A person's absence from a locality does not by itself change that person's residence. Matter of Newcomb, 192 N.Y. 238, 250-251 (1908); Matter of Hodge, 27 St. Dept. Rep. 690-692 (1922). And the Commissioner has recognized that "a residence is not lost until another residence is established through both intent and action expressing such intent." Matter of Stewart, 21 Ed. Dept. Rep. 160-162 (1981), citing Matter of Gladwin v. Power, 21 A.D.2d 665, aff'd 14 N.Y.2d 771 (1964); Matter of Buglione, 14 Ed. Dept. Rep. 220, 223 (1975); Matter of Callahan, 10 Ed. Dept. Rep. 66, 67 (1970). Although the Richards family may lack a specific address in

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[33] "[In making residency determinations] more regard is ... given to the test of whether the place of habitation is the permanent home of a person with the range of sentiment, feeling and permanent association with it." In Re Bourne's Estate, 181 Misc. 238, 246 (1943), aff'd 267 App. Div. 876, aff'd, 293 N.Y. 785 (1944), citing Matter of Benjamin's Estate, 176 Misc. 518, 533, aff'd 263 App. Div. 981, aff'd 289 N.Y. 554 (1942).

Port Chester, there is no evidence that they have established a residence elsewhere.[34]

In sum, petitioner's continued community ties to Port Chester, her stated intent and actions expressing her intent to maintain her residency in Port Chester, as well as the very transient nature of the family's emergency housing accommodations, clearly establish that petitioner neither abandoned her residency in Port Chester nor established residency elsewhere.

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[34] The New York Court of Appeals has held that "...a bird of passage, a traveler who had not as yet...selected a new domicile by choice..." remained a resident of her last permanent domicile. *In re Johnson's Will*, 259 App. Div. 290, 291 (1940), *aff'd*, 84 N.Y. 733 (1940). Since it is undisputed that at the time petitioner became "homeless," she was a legal resident of Port Chester and her children were attending school there, her sojourns to emergency accomodations in other communities could not have affected her residency.

POINT II

"HOMELESS" PERSONS CONTINUE TO BE RESIDENTS OF THE SCHOOL DISTRICT IN WHICH THEY LAST ATTENDED SCHOOL UNLESS THE DISTRICT CAN ESTABLISH BY CLEAR AND CONVINCING PROOF THAT THEY ABANDONED THEIR RESIDENCY IN THE DISTRICT AND ESTABLISHED A NEW RESIDENCE ELSEWHERE.

Petitioner has demonstrated above that she continues to be a resident of Port Chester. Moreover, petitioner contends that it is the _respondents_ who must shoulder the burden of proof and demonstrate that she has taken up residence in another school district.

The New York State Court of Appeals has held that "[t]he existing domicile whether of origin or selection continues until a new one is acquired and the _burden of proof rests upon the party who alleges a change._" _Matter of Newcomb_, 192 N.Y. 238, 250 (1908). (Emphasis added). Thus, it is the rule in the state courts that "[t]he burden of proving a change in domicile is on the party asserting the change.... _The standard of proof in such cases is that the evidence establishing such a change must be clear and convincing_." _Wilke v. Wilke_, 73 A.D.2d 915, 916 (2d Dept. 1980). _Accord_, _Bodfish v. Gallman_, 50 A.D.2d 457, (3rd Dept. 1976)(Existing domicile continues until a new one is acquired and the burden of proof is upon the party who alleges a change); _Vitro v. Town of Carmel_, 433 F. Supp. 1110 (S.D.N.Y. 1977).

The Commissioner has followed this rule in his proceedings. For example, the Commissioner has held:

> "The burden of establishing that [a school board member] was not in fact a resident of the district...rests with petitioner [the party alleging a change]."

Matter of Callahan, 10 Ed. Dept. Rep. 66, 67 (1970).

Respondents neither made a finding that petitioner's residence is in another district nor offered any evidence of a new residence. Despite all of the factors which establish petitioner's intent to remain a resident of Port Chester, respondent Mix told petitioner to register David in the school district in which "[you] presently reside," without making any determination as to the particular district in which petitioner allegedly had taken up a new residence.[35] If the Superintendent was referring to one of the school districts where petitioner and her family were temporarily placed in a motel by the Department of Social Services, then clearly he was in error. In fact, petitioner's only "contacts" or "ties" to each of those school districts (of which there have been five to date) were that she and her family slept in motels there for a fortnight or so. Surely these are not "sufficient actual contacts," Matter of Stewart, 21 Ed. Dept. Rep. 160, 162 (1981) to establish residency. Accordingly, respondents have not met their burden of proof: they failed to show by "clear and convincing evidence," *Wilke v. Wilke*, *supra*, that petitioners abandoned their residency in Port Chester or established a residence in another school district since they became "homeless."

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[35] When Elaine was excluded from school in September, petitioners were staying at the Sheraton Hotel in the City of New Rochelle. When David was excluded, they were in the Larchmont Motel, in another district. As of this writing, petitioners are in the Elmsford Motel, in yet another school district.

POINT III

STATE POLICY, SOUND EDUCATIONAL PRACTICES, AND THE BEST INTERESTS OF CHILDREN ALL REQUIRE CONTINUITY IN THE EDUCATION OF HOMELESS CHILDREN

The respondents' determination was inconsistent with settled principles of the law of residency, as demonstrated above. Moreover, petitioner contends that any other result would be contrary to State policy, sound educational practices, and the best educational interests of the needy petitioner's children.

A. State Policy Favors Continuity in the Education of the Poor.

State policy consistently seeks to reinforce stability and minimize the disruption and fragmentation of education for indigent children. The State Constitution, Article XVII, Section 1, provides that the "aid, care and support of the needy are public concerns," and Article XI provides that public education shall be "free." Both the Education law and Social Services law provide that "[p]ublic welfare officials...shall furnish indigent children with suitable clothing, shoes, books, food and other necessaries to enable them to attend [school] upon instruction...[as] required by law." N.Y. Education Law, §3209; N.Y. Social Services Law, §397(1). In addition, the compulsory education law requires "regular" attendance of all children aged six to sixteen, N.Y. Education Law, §3210, and the appointment of school attendance officers to ensure that:

> ...children shall not suffer through unnecessary failure to attend school for any cause

> whatsoever, it shall be the duty of each attendance teacher...to secure for every child his right to educational opportunities which will enable him to develop his fullest potentialities for education, physical, social and spiritual growth as an individual and to provide for the school adjustment of any nonattendant child in cooperation with school authorities, special school services and community and social agencies.

N.Y. Education Law, §3213(1). [Emphasis added]. Together, these statutory and Constitutional provisions emphasize the overriding policy of the State of New York to ensure that indigent children like petitioner's attend school regularly.

Since abolition of the poorhouses, the Legislature has stipulated that public assistance to the needy shall, whenever possible, be provided to them "in their own homes." N.Y.Soc. Serv. Law, §131. Thus the housing of families in emergency motels, hotels, and shelters stands out as a truly extraordinary situation. The New York State Department of Social Services, the agency responsible for the supervision of public assistance and care for the needy, has directed local Social Services Commissioners to provide emergency housing to "homeless" families with school age children only as a last resort and in a way that will minimize any disruption of their education. The Social Services Commissioner has stated:

> The number of homeless persons in New York has increased dramatically in recent years. As a result, the Department is developing a comprehensive policy on the prevention of homelessness and the provision of temporary housing. This policy is designed to ensure that emergency housing placements are as brief as possible and **minimize both the dislocation from the homeless person's community and any disruption to the client's life caused by such dislocation.** [Emphasis added].

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> IV. REQUIRED ACTION
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> A. Public Assistance.
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> * * * *
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> 4. Types of Assistance to Homeless Persons
>
> a. Whenever possible, districts are encouraged to place homeless persons in the temporary housing which is least likely to cause disruption in the life of the client, **with particular attention to educational and community ties.**

N.Y.S. Department of Social Services, Administrative Directive 83 ADM-47 (Sept. 29, 1983). [Emphasis added].[36] Thus, State policy discourages the uprooting of families from their homes, communities and schools.[37] In Westchester County, the local Department of Social Services is actively trying to maintain the continuity of Elaine and David's education in the Port Chester Schools, and is assisting petitioner in her search for another apartment in the district. Petitioner's family has been provided emergency housing outside the district only as a last resort.

Respondents' effort to discontinue the education of petitioners' children in their home community was thus in contravention of well established State policy.

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[36] A copy of this Administrative Directive is attached to this brief as Appendix "F".

[37] The Court of Appeals in Freiderwitzer v. Freiderwitzer, 55 N.Y.2d 89, 94 (1982), set forth a list of factors to be considered in determining the best interests of children in custody matters. The first and most important factor is the stability of the present living arrangement.

B. Sound Educational Policy and The Best Interests of Needy Children Require Continuity in Education

As a matter of sound educational policy and the best educational interests of the children,[38] it makes no sense to shuttle pupils from the schools of one district to another simply because the location of temporary shelter is changed.[39] Normal variations in school curriculae, particularly for a child like David whose placement is designed and monitored by a Committee on the Handicapped, would make it extremely difficult for such transient pupils to benefit at all from instruction. The lack of any consistency in their instruction would greatly enhance the likelihood of their falling behind.[40] It takes time for teachers to get to know individual students and their needs. Those who know the petitioner's children best are the teachers of the Port Chester Schools. Nor should the Commissioner ignore the social and psychological impact upon families who are dislocated, even temporarily, by a housing crisis. For indigent, "homeless" children, it is the school, with familiar teachers and school friends, that provides the real stability and consistency they need to continue to grow socially and intellectually. As was recently observed:

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[38] The Commissioner has indicated that in some circumstances, even when a child is not a resident, the "best educational interests" of the child may require continuity in a course of study. See Matter of Buglione, 14 Ed. Dept. Rep. 220, 224 (1975).

[39] Multiple transfers of children from school to school depending upon the location of temporary housing also discourage the "regular" attendance of children that is required under the compulsory education law. N.Y. Education Law, 3210. See "Cruel Odyssey of the Homeless Seeking a Bed," New York Times, January 16, 1985,("Constant moving" has forced homeless children in and out of school). A copy of this article is attached to this brief as Appendix "G".

[40] For a pupil whose educational program is tailored by a Committee on the Handicapped (COH), like David, it would be wasteful, impractical, and counterproductive to have new COH proceedings in each district to which a family is temporarily located. The time required for such COH reviews probably would lead to a child's not receiving the special education to which he is entitled.

> A child builds a little family in the classroom.... The teacher is the mother figure and the routines are familiar even down to the way the class lines up at the door. The student knows what to expect of the teacher and what the teacher expects of him or her....
>
> Student mobility is seldom acknowledged as a problem by critics of the schools, but some experts suspect it is important in undermining the ability of youngsters from deprived backgrounds to build a solid foundation for learning. Unlike the children of corporate executives or military personnel, who may also endure frequent relocation, the children of the poor are less likely to be able to fall back on their families to cushion the impact.

"Frequent Moves Affect Schoolwork," N.Y. Times, Nov. 27, 1984.[41]

If respondents' position were adopted, petitioner's children would have attended at least five different schools since September 1984. In each district, they would have been strangers to the teachers, strangers to their classmates, and strangers to the curriculum of each school. In similar circumstances, it was recently observed:

> Inasmuch as the City [of New York] obviously has great difficulty in relocating a family [dislocated] by fire or eviction in its original neighborhood, attending the local school remains one of the only stable links left to such a family, and if that family cannot be

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[41] A copy of this article is annexed to this brief as Appendix "H".

> relocated near a school, the next best thing is to provide the wherewithal for the necessary travel.

Fulton v. Krauskopf, __M.2d__, N.Y.L.J. April 19, 1984, Page 6, Col. 6. (Sup Ct. N.Y. Co., Greenfield, J.)(Emphasis added).[42]

In this case, petitioner has maintained her strong community ties in Port Chester, and the respondents' decision, if upheld, would only undermine her efforts to maintain her family's stability during a time of enormous stress. As indicated in Fulton, transportation of the children is not an issue; it is the obligation of the Department of Social Services to make necessary transportation allowances for temporarily dislocated students to continue to attend their schools. N.Y. Education Law §3209; N.Y. Social Services Law, §397. In Westchester County, a recent consent decree in a case brought on behalf of "homeless" persons also provides that the Department of Social Services shall make transportation allowances to enable students living temporarily out of a district to continue attending its schools.[43] Thus the transportation difficulties occasioned by emergency relocations of the poor are being addressed in this case by the Department of Social Services and create no special hardship for the district of residence. And while the dislocation of families and the attendant inter-district transportation of students at the expense of the Department of Social Services may be less than ideal, and should be discouraged, the benefit to the children of continuity in their education far outweighs the inconvenience of transportation in this case.[44] Thus, as a matter of sound educational and administrative policy, petitioner's children should continue to attend the school in respondents' school district. To conclude otherwise only would enhance the likelihood of school failure, truancy and the decision to drop out of school altogether.[45]

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[42] A copy of Fulton v. Krauskopf, supra, is annexed to this brief as Appendix "I."

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[43] Ehlers v. Bates, (N.Y.Sup. Ct. Westchester Co. No. 10525/83)(consent judgment entered Feb. 16, 1984), 18 Clearinghouse Review 187, No. 36,187 (June, 1984). The current Westchester County policy regarding transportation for "homeless children provides:

> If a family cannot be placed within their community, and resources normally available to them are not available at the location of their emergency placement, service workers should authorize the use of EAF [Emergency Assistance to Families] to provide transportation (preferably public but, if unavailable, private) for **children to attend school** (if not provided by the school district)....

Westchester County Department of Social Services, Administrative Memorandum No. 578, "Emergency Housing," (January 24, 1984). A copy of this Administrative Memorandum is annexed to this brief as Appendix "J".

The requirement that a Department of Social Services provide for transportation of pupils temporarily relocated out-of-district creates a fiscal and administrative incentive for the emergency housing of poor families in or near their district of residence.

[44] None of the more than forty school districts in Westchester County is more than a 45 minute drive from another, and most situations would involve less travel time.

Accordingly, by following the established principles of residency law, State policy, and sound educational policy, the best educational interests of the children also are furthered.

POINT IV

DECLARATORY RELIEF SHOULD BE GRANTED TO GIVE GUIDANCE TO LOCAL DISTRICTS FACED WITH THE PROBLEM OF DETERMINING THE RESIDENCY OF "HOMELESS" PERSONS AND TO PROTECT THE EDUCATIONAL INTERESTS OF "HOMELESS" PUPILS

For the foregoing reasons, the Commissioner should reverse the determinations of the respondents and direct them to continue to educate the petitioner's children as residents. In addition, petitioner seeks a declaratory judgment concerning the obligation of school districts to continue to educate resident pupils who are temporarily housed by a Department of Social Services in motels or other emergency shelter accomodations outside the school district. In Westchester County alone there are more than forty school districts in close proximity to one another. In 1984, the County Department of Social Services provided emergency housing for 2,629 families. In October, 1984, 340 families with 697 children were in emergency accommodations, not to mention many more who may have found friends or relatives to house them temporarily.[46] At the present time the Westchester County Department of Social Services places about 1,000 people in emergency housing locations each night and the problem of housing poor families in Westchester County is growing.[47] Inevitably there will be difficulty in determining where children in such families are entitled and required to attend school.

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[45] See "The Hotel Kids are Failing School - and Vice Versa," New York Times, Nov.20, 1983).

Under Section 204 of the New York State Administrative Procedure Act, the Commissioner of Education may issue a declaratory ruling. Petitioner seeks a declaratory judgment which spells out for local districts that a student who becomes homeless and who has been placed in emergency accommodations outside his school district continues to be a resident of the school district in which he was attending school unless the school district can prove, by clear and convincing evidence, that:

1. The student abandoned his residence in the school district;
2. The student established another residence outside the school district;
3. The student intends to make the emergency placement a permanent home;

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[46] Letter from Mary Glass, Director of Income Maintenance, Westchester County Department of Social Services, dated January 16, 1985. A copy of the letter is attached to this brief as Appendix "E".

[47] See, e.g., "Workers With the Homeless Call Shelters a Poor Stop Gap," N.Y.Times, Westchester Sunday Section, Dec. 16, 1984. A copy of this article is attached to this brief as Appendix "D." See also, "Homelessness Spreading to Bedroom Communities," N.Y.Times, July 15, 1984. "The Homeless: A Growing Concern in Westchester," Gannett Westchester Newspapers, October 21, 1984; "In the Dead of Winter Decent Apartments at Affordable Prices are Nearly Impossible to Find." Gannett Westchester Newspapers, Feb. 6, 1985.

4. The purpose of the student being placed at the emergency location is to establish a permanent home there;

5. The student has abandoned his contacts within the prior school district and has developed sufficient actual contacts in another district to establish residency there; and

6. The best educational interests of the student require a transfer to another school district.

Homelessness in our society is a very complex problem. Each branch of State and local government has its respective role, responsibility, and powers that can and must be brought to bear on the problem. As for the Commissioner of Education, he bears the ultimate responsibility for implementation of the State's Constitutional and statutory commands that there be free, high quality public education for all school-age children, and that all of those children, particularly the economically disadvantaged, attend school regularly. Issuance of a declaratory judgment will give local school districts that look to the Commissioner for guidance in these matters the assistance they need to address any school residency problems of homeless children.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that the Commissioner grant the relief requested in the Petition, and such other and further relief as seems just and proper under the circumstances.

Dated: February 14, 1985

Respectfully submitted,

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III. CASES AND PLEADINGS

A. Decided Cases

2. Delgado v. Freeport Public School District

In the Matter of Iraida DELGADO, on behalf of her two minor sons, Petitioner,

for a Judgment pursuant to Article 78 of the Civil Practice Law and Rules,

v.

FREEPORT PUBLIC SCHOOL DISTRICT and Dr. Bierwith, as Superintendent of Schools, Respondents.

Supreme Court, Nassau County,
Special Term, Part II.

Feb. 21, 1986.

Mother brought action to compel school district to allow her children to register for and attend the public schools operated by the district. The Supreme Court, Nassau County, Murphy, J., held that children were entitled to attend schools in district in which they resided in shelter for the homeless, without regard to the length or permanency of the residency, and mother was not entitled to have children registered in district which children previously attended.

Ordered accordingly.

1. Schools 🔑155

Burden of proving residence in particular school district and the right to send children to school there rather rests with the petitioner.

2. Schools 🔑153

Children who lived in shelter for the homeless in school district were entitled to education in schools of that district without payment of tuition regardless of whether their residency would be short or long and of whether it was temporary or permanent and regardless of mother's expressed desire to have children registered in district where they previously attended school.

Leonard S. Clark, Hempstead (Beth Polner, of counsel), for petitioner.

Cooper & Sapir, P.C., Mineola, for Roosevelt UFSD.

Irving M. Wall, New York City, for respondents.

GEORGE A. MURPHY, Justice.

The petitioner brings this proceeding pursuant to Article 78 of the CPLR to obtain a judgment of the Court requiring the respondent, FREEPORT UNION FREE SCHOOL DISTRICT, to allow her infant children to register for and attend the public schools operated by the respondent. Petitioner has also moved to add the Roosevelt Union Free School District as a necessary party and that application is granted.

The petitioner and her children are the recipients of public assistance from the County of Nassau Department of Social Services. They are presently being housed in what is characterized by the parties as Bethany House, a temporary abode for those without a permanent home. Such facility is made available through private sponsorship but the cost of such housing is borne solely by County Department of Social Services. A condition of such housing is that the recipient spend the daytime hours away from such premises and in search of permanent housing. The petitioner says she leaves her two minor children with a relative during such daytime period as they are not presently in the school room where they would be if afforded their right to an education under the applicable statutes. (Education Law 3202 subd. 1.)

The petitioner and her children resided in the Village of Freeport during the years 1984 and 1985 and the children, at that time attended schools with the Freeport Union Free School District. In October of 1985, because of circumstances beyond her control, the petitioner was placed with her two children in housing within the Village of Malverne and her children attended school there. The petitioner returned to an abode in Freeport in November but that was terminated for legal reasons also beyond her control effective January of the current year. The family was then placed in Wyandanch in Suffolk County and following that in Bethany House, located in Roosevelt, Nassau County.

It is not disputed that the petitioner's children have been refused admission to the public schools of Roosevelt and Freeport for reasons presented to this Court on behalf of each of those two districts.

Section 3202, subdivision 1, of the Education Law of the State of New York provides that:

> "A person over five and under twenty-one years of age is entitled to attend the public schools in the district or city in which such person resides without the payment of tuition."

Presented to the Court is a dispute which arises from the contention of the petitioner and the Roosevelt Union Free School District that the petitioner and her children are in fact and in law residents of the Freeport Union Free School District and not legal residents of the Roosevelt Union Free School District. This contention is based on the theory that one does not change residency unless the intention to make a change is manifested. Absent such intention, it is argued, the last residency and all the rights that attach to it must prevail, and that includes the right to public education at schools within the district of such "retained" residency. The petitioner also argues that it is very much an aspect of the state policy that any placement of children in public housing avoid, to the extent possible, an adverse effect on their in place or established educational and social involvements. The Roosevelt Union Free School District argues that since these children had spent so much time in the Freeport schools before circumstances forced their move elsewhere and finally to Roosevelt on a strictly temporary basis, nearby Freeport schools retain for both legal and common sense reasons the duty to carry on the educational service owed these children.

[1] Whether a child is a resident of a particular school district for the purposes of the Education Law is "a mixed question of law and fact" (*People v. Henrickson*, 125 A.D. 256, 109 N.Y.S. 403, Affd. 196 N.Y. 551, 90 N.E. 1163). The burden of proving residence in a particular district rests with the petitioner (*Matter of Conine*, 9 Ed Dept Rept 32; *Matter of Fenton*, 15 Ed Dept Rept 100; *Matter of Van-Curran and Knop*, 18 Ed Dept Rept 523). Additionally, it is settled that a determination by a board of education or a superintendent of schools that a child is not a resident of the school district will not be set aside unless it is demonstrated that the determination is arbitrary, capricious, or unreasonable (*Matter of Shelmiding*, 22 Ed Dept Rept 206).

The Court finds that the petitioner and her children reside within the Roosevelt

Union Free School District within the meaning of Section 3202, subdivision 1 of the Education Law. Thus, the children were wrongfully rejected by the authorities in the Roosevelt Union Free School District. The cited section has as its purpose the protection of a school district from any mandate to educate children who are not residents of the district.

[2] The petitioner and her children live in Roosevelt. Thus, they enjoy all the rights of their neighbors, including the right of each of these two children to be educated in the Roosevelt schools without the payment of tuition. It is quite irrelevant to a resolution of this dispute whether the residency will be short or long, temporary or permanent. The question of residency is and must be a question of fact and not surmise. This Court will not speculate how long the family will enjoy the entitlement of educational services in Roosevelt even while it hastens to decide that here and now the schools of Roosevelt must and shall be opened to these children as residents and not as merely tolerated visitors from somewhere, address unknown. However, they arrived in Roosevelt, they are there, without need for apology to anyone. Behind them are their stays of varying length in Freeport, in Malverne, in Wyandanch, a history that need not burden nor handicap nor specially or uniquely benefit them in their present situation and needs.

The petitioner seeks to have her children registered in Freeport schools. Her preference, however, is not at all governing. In fact, an effort to establish or claim residency solely for the purpose of attending a particular school must necessarily fail as contrary to the letter and spirit of the section of the Education Law pertinent hereto. (*Matter of Moncrieffe*, 121 Misc.2d 395, 467 N.Y.S.2d 812; *Matter of Drayton v. Baron*, 52 Misc.2d 778, 276 N.Y.S.2d 924.) At the present time, the petitioner and her children have no abode except that which they have in Roosevelt nor is there any evidence how long they shall have that abode or when or where their next abode, if any, will be. In such a circumstance, it is incumbent upon both the petitioner and the school authorities of Roosevelt to attend to the schooling of these two youngsters in the place where they live.

For the guidance of the parties this Court finds that the petitioner has not established significant or determinative ties with Freeport. What ties were shown amount merely to living there. Such ties can be developed with ease wherever the family lives. Petitioner's citation of *Richards v. Bd of Educ Port Chester-Rye UFSD*, Decision No. 11490 of July 17, 1985 is distinguishable on its facts. On the other hand, *Matter of Moncrieffe, supra*, proclaims the duty to accept this family with grace and not to challenge its educational rights on clearly insufficient technicalities. Also instructive on the subject of temporary residence is *Vaughn v. Bd. of Ed. of UFSD No. 2*, 64 Misc.2d 60, 314 N.Y.S.2d 266.

The fact of the matter is that what the petitioner and Roosevelt want is not legal, fair or practical. The problem of finding a safe and suitable way to deliver these children to Freeport schools from their abode in Roosevelt has not been clarified. How they would be returned to Roosevelt is equally unclear. It just doesn't make sense to have children living in Roosevelt go back to Freeport for further education when other children living in the same abode or on the same street are attended to by their own available and convenient school facilities. The proposed resort to Freeport schools would, at once, make them "visitors" both where they go to school and in their home community of Roosevelt.

The petition is dismissed as against the respondent Freeport Union Free School District.

The Court directs that judgment be settled on notice with costs against the Roosevelt School District. The Court has stated and reiterates that a prompt return to school by these children is essential and, therefore, the Court, on its own motion, is issuing a short form order on this 21st day of February, 1986, requiring the respon-

dent Roosevelt Union Free School District forthwith to accept the registration of these two children so that no later than on Monday, February 24th, 1986, they will be in a class in a school of the Roosevelt School District appropriate to their academic credentials and level.

recv'd 2/20/86
by hand

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
--X

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In the Matter of

IRAIDA DELGADO,

10 P.

on behalf of her two minor sons,

1001756

Petitioner,

Index No. _____/86

for a Judgment pursuant to Article 78
of the Civil Practice Law and Rules

- against -

FREEPORT PUBLIC SCHOOL DISTRICT and
DR. BIERWITH, as Superintendent of
Schools,

(Hon. G. A. Murphy)

Respondents.
--X

RESPONDENT FREEPORT UNION FREE SCHOOL DISTRICT SUPPLEMENTAL MEMORANDUM OF LAW

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
--------------------------------------X

In the Matter of

IRAIDA DELGADO,

on behalf of her two minor sons,

Petitioner,

for a Judgment pursuant to Article 78
of the Civil Practice Law and Rules

- against -

FREEPORT PUBLIC SCHOOL DISTRICT and
DR. BIERWITH, as Superintendent of
Schools,

Respondents.
--------------------------------------X

SUPPLEMENTAL MEMORANDUM OF LAW

(Hon. G. A. Murphy)

PRELIMINARY STATEMENT

This Memorandum of Law is being submitted on behalf of the Freeport Union Free School District ("Freeport") in response to the Memorandum of Law submitted by the Roosevelt Union Free School District ("Roosevelt") in accordance with the authorization of this Court.

FACTS

Respondent Roosevelt has inadvertaintly ommitted from its statement of facts the Petitioner's statement in her affidavit, executed on February 14, 1986 (at the top of the second page thereof) and attached to the Petitioner's Reply Affirmation, the following statement in Petitioner's words:

> "For one month (during October), my family lived at 3 Colonial Road, Malverne. We were placed at this address by the Department of Social Services. My sons attended school in Malverne for three weeks."

While the placement in Malverne was obviously temporary, the Petitioner, nevertheless, sent her children to the Malverne schools. Petitioner returned to Freeport briefly (approximately two months) to live in an illegal basement apartment after which the Department of Social Services ("Social Services") placed the Petitioner in housing in Wyandanch (Suffolk County) and then in Roosevelt where the Petitioner and her family now reside.

There is no indication where, or whether, Social Services will move the Petitioner and her family in the future; it could be Malverne, Wyandanch, Great Neck or elsewhere, but the fact remains that the Petitioner's family lives in Roosevelt NOW, and the Roosevelt schools are the easiest for them to attend without any need for transprtation.

THE ISSUE

What School District shall educate the Petitioner's children under Section 3202.1 of the Education Law of the State of New York?

THE LAW

The first sentence of Section 3202 is the relevant law and it reads:

"3202. 1. A person over five and under twenty-one years of age who has not received a high school diploma is entitled to attend the public schools mainained in the district in which such person resides without the payment of tuition.

POINT I

ROOSEVELT MUST EDUCATE THE PETITIONER'S CHILDREN.

Since the Petitioner and her children now live in Roosevelt, the Roosevelt schools are required to educate them. No, says, Roosevelt, they are not really here, they are just here temporarily, "... petitioner's sojourn in Roosevelt is extremely transitory...." The Appellate Division and the Court of Appeals disagree. In *People v. Hendrickson*, (1908) 125 App. Div. 256, 109 N.Y.S. 403, affirmed 196 N.Y. 551, 90 N.E. 1163, the Court held that in enacting the provisions relative to free tuition for resident children,

> "... it was the intention of the Legislature that children temporarily domiciled in the district should receive free education there, ... ".

It is interesting to note that in citing *Matter of Montcrieffe*, 121 Misc 2d 395, 467 N.Y.S. 2d 812, 813 (1983) on Page 7 of its Memorandum of Law for the purpose of suggesting that "residence" requires an intention to remain, Roosevelt neglected to note that the Court went on to say that residence solely to achieve the right to attend a particular school would fail to meet the traditional test of residence.

Roosevelt gratuitously states, at the bottom of Page 7 of its Memorandum of Law:

"All decisions define residence as requiring an intention of permanency."

That statement, aside from being false as a matter of fact, and as a matter of law (as demonstrated in the cases cited in Freeport's Memoranda of Law and Affirmations), has no practical application here. Even where people have a free choice, most people's residences are a transition till they acquire a new residence, and the only truly permanent residence is in a burial plot. In this case the intention of the Petitioner is not at issue. Whatever the Petitioner's hope, desire or aspiration for housing may be, she and her children, while receiving assistance from Social Services, must live wherever Social Services finds them a home. When placed in Malverne, the Petitioner elected to send her children to the Malverne schools despite the "extremely transitory" nature of their stay in that community, and by so doing the Petitioner clearly abandoned her former Freeport residence and all ties with the Freeport community. If the Petitioner and her children were next to be housed in the Freeport Union Free School District, or in Wyandanch, or Great Neck, or Roosevelt her children would be required to attend school in the community in which she was housed.

Roosevelt implies, on pages 8 and 9 of its Memorandum of Law, that Social Services' housing of the Petitioner in Roosevelt is "analagous to an individual being placed in a prison, a hospital or some other type of institution." Would the same apply if the Petitioner was placed in Freeport or Malverne or Wyandanch? Since, on information and belief, the Petitioner and her children have been receiving assistance from Social Services, on and off, for a considerable length of time (according to Petitioner's attorney, since Petitioner was first married) of what significance is such placement, and how does one determine whether such placement is voluntary or involuntary? If the choice is left up to the Petitioner we do have the classic case of school shopping. Roosevelt's discussion about the residences of persons in prisons, hospitals, alms houses, asylums, family homes and other such places, while interesting, are totally irrelevant to the meaning of residence under Section 3202 .1 of the Education Law.

Pray God that a residence is found for the Petitioner and her children that is more permanent than what she has had, but until then her children must attend school as a matter of law, and Roosevelt is the only practical and proper school district for that purpose. The children would be within walking distance of where they live and they would not be aliens to their peers.

POINT II

PETITIONER FREELY ABANDONED HER FREEPORT RESIDENCE IN FAVOR OF MALVERNE EVENTHOUGH HER MALVERN RESIDENCE WAS TEMPORARY.

"Determinations of residency are mixed questions of law and fact which do not lend themselves to general declarations. Rather, each circumstance must be reviewed individually to determine the student's residence. Nor do policy considerations lead inevitably to a conclusion that all homeless students should be required to return to the district in which they resided at the time they became homeless." So stated the Commissioner of Education in Matter of Richards, Decision #1490, (1985) 24 Ed. Dept. Rep. ___, the case upon which the Petitioner and Roosevelt rely so heavily.

The facts in Richards and the facts here couldn't be more different when it comes to the issue of residence. Freeport has defined those differences in its previous Memorandum of Law so that there is no need to repeat the same. When less than four months ago the Petitioner here left her residence in Freeport and chose Malverne as her new residence, evidencing that fact by sending her children to school in Malverne, she clearly indicated that she was abandoning her former residence in Freeport in favor of Malverne. Whereas in Richards, where the family was housed in six different motels while it maintained continuing and on-going ties to the community of Port Chester which never waivered, the facts indicated a determination, loyalty, continuity and intent to remain in Port Chester. There was surely no evidence of any abandonment of the Port Chester community by Richards.

POINT III

THE ISSUE BEFORE THIS COURT IS WHO EDUCATES THE PETITIONER'S CHILDREN, NOT WHO PAYS FOR THAT EDUCATION.

In the last sentence before Roosevelt's ARGUMENT appearing on page 2 of its Memorandum of Law Roosevelt says: (Freeport schools) ... have refused to pay tuition to the Roosevelt schools so that the children may attend that school district." On page 12 of Roosevelt's Memorandum of Law the issue of dollars again rears it head: "Alternatively, if agreed to by Roosevelt, Freeport might contract with Roosevelt to allow the children to attend the Roosevelt schools, based upon a tuition payment by Freeport to Roosevelt."

Roosevelt seems less concerned with who educates these children than with who pays for that education, pleading poverty on pages 11 and 12 of its Memorandum. It may well be that Roosevelt, if it is required to educate the Petitioner's children, may be able to bill some other school district for the cost of such education. That would certainly be the case if Social Services were to place the children herein in family homes at board under Section 3202.4. The lack of funds is no greater in Roosevelt that in Freeport and that issue should not enter in this Court's decision.

It is undenied by any party hereto that the Petitioner's children have been placed, temporarily, in various school districts in two counties, and that situation may well continue. That does not resolve the question as to where said children should be educated in the meantime. The Petitioner really has very little choice in determining where she and her children shall live as long as Social Services must contribute to that cost. An exploration of Petitioner's residential history might reveal that The Bronx is the last place in which she freely resided before she had to accept assistance from Social Services. The arbitrary selection of The Bronx, Wyandanch, Malverne or Freeport makes no sense at all. Under the facts in this case it is abundantly clear and fair that the Petitioner's children should attend those schools in the community in which they physically reside. While that may result in occasional transfers, it is certainly better that not having them attend school at all.

POINT IV

FREEPORT'S DETERMINATION THAT THE PETITIONER WAS NOT A RESIDENT OF FREEPORT IS NOT ARBITRARY, CAPRICIOUS OR UNREASONABLE.

The Freeport Superintendent of Schools determined that the Petitioner was residing in Roosevelt, accordingly he denied the Petitioner's children the right to attend the

Freeport Schools on the basis of all of the facts and circumstances in this case, and such decision is consistant with the law and should not be set aside:

> "A determination by a board of education or a superintendent of schools that a child is not a resident of the school district will not be set aside unless it is established by the petitioner to be arbitrary, capricious or unreasonable,..."

Matter of Shelmiding, 22 Ed. Dept. Rep. 206. accord, Matter of Buglione, 14 Ed. Dept. Rep. 220, both cases cited in Matter of Delgado, 24 Ed. Dept. Rep. ___ ,Decision # 11394, January 30, 1985 by the Commissioner of Education.

It is respectfully submitted that the Petitioner has failed to prove that Freeport's decision was arbitrary, capricious or unreasonable; or that Petitioner is a bona fide resident of the Freeport Union Free School District; or that Petitioner is entitled to the relief requested in her motion.

CONCLUSION

Petitioner's motion should be denied and the petition dismissed as a matter of fact and law.

Respectfully submitted

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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In the Matter of IRAIDA DELGADO, on
behalf of her two minor sons,

Petitioner,

for a Judgment pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

FREEPORT PUBLIC SCHOOL DISTRICT and
DR. BIERWITH, as Superintendent of
Schools,

Respondents.

MEMORANDUM OF LAW

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
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In the Matter of IRAIDA DELGADO, on behalf of her two minor sons,

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MEMORANDUM OF LAW

PRELIMINARY STATEMENT

This memorandum of law is submitted on behalf of the Roosevelt Union Free School District (hereinafter "Roosevelt") to demonstrate why it should not be made a party respondent in the instant proceeding or, in the alternative, that the petition as against Roosevelt be dismissed.

FACTS

From in or about March 1984 through December 31, 1985, petitioner and her children resided within the Freeport Union Free School District, and her children attended the Freeport schools (Petition paragraphs 4, 7 and 8). At that time, petitioner's residence was declared to be an illegal basement occupancy, and petitioner and her family were placed in emergency housing in Wyandanch (Petition paragraph 9).

On January 21, 1986, petitioner and her children were removed to a temporary shelter, Bethany House, in Roosevelt. Bethany House is a temporary shelter for homeless families sponsored by the Society of St. Vincent de Paul and Queen of the Most Holy Rosary Church. Petitioner's stay was paid for by the Nassau County Department of Social Services (Petition paragraphs 10 and 12).

Respondent Freeport Public Schools have refused to allow petitioner's sons to attend the Freeport schools, and they have refused to pay tuition to the Roosevelt schools so that the children may attend in that school district.

ARGUMENT

ROOSEVELT UNION FREE SCHOOL DISTRICT IS NOT OBLIGATED TO ENROLL PETITIONER'S CHILDREN HEREIN

The issue facing this Court is not whether petitioner's children are entitled to a free public education. All parties concur that they are. The very narrow issue directed to this Court is what school district is obligated under Section 3202.1 of the Education Law to provide a free public education. Section 3202 is entitled "Public schools free to resident pupils; tuition from non-resident pupils". Section 3202.1 states in part that a person "is entitled to attend the public schools maintained in the district in which such person resides without the payment of tuition." Section 3202.2 goes on to state that non-residents of a district may be admitted into the schools of that district upon the consent of the board of education and upon terms prescribed by the board.

A fair reading of the law, together with a review of the facts and pronouncements of other courts and the Commissioner of Education will clearly demonstrate that Roosevelt is not obligated to provide a free education to the children of petitioner. The statute makes it clear that admission is required only if the children involved are "residents" of the school district. Thus, the issue of residence is the controlling question herein.

It is uncontested that petitioner is currently staying at what has been termed a temporary emergency shelter until such time as petitioner is able to find a permanent residence. It is clear that petitioner's sojourn in Roosevelt is extremely transitory. It falls far short of those requirements necessary to establish a residence.

In 1926, the Commissioner of Education of the State of New York was asked to rule on a matter bearing some similarities to the situation before this Court. At that time, a system arose providing for temporary detention of children, pending final disposition of their cases in Children's Court. Detention was either to be in a detention home established as an agency of the Court or in a private home approved by the

Court. The children were then placed in permanent homes or institutions. The Commissioner, in *Matter of Appeal of Board of Supervisors, Chautauqua County*, 35 St. Dept. 538, held that the children were not residents of the school district in which these temporary detention homes were located, and therefore the children were not entitled to a free public education within the schools of such district.

In 1927, in *Matter of Galick*, 37 St. Dept. 15, the Commissioner of Education had reason to interpret the predecessor of Section 3202.1 of the Education Law, and he stated at page 17:

> "Inhabitancy and residence mean fixed and permanent abode or dwelling place for the time being, as distinguished from a mere temporary *locality of existence*. To acquire a domicile or residence, two things are necessary - the *fact* of residence in a place and the intent to make it a home." (emphasis in original)

More recently, the Commissioner of Education held, in *Matter of VanCurran*, 18 Ed. Dept. 523, 524 (1979):

> "In order for Evelyn to be considered a resident of the West Seneca district, she must establish that her residence there is her place of domicile *and that it is intended to be permanent*." (emphasis added)

In *Matter of Appeal of Wadas*, 21 Ed.Dept. 577, 579-580 (1982), the Commissioner of Education stated:

> "[T]he evidence before me is insufficient to establish that petitioner intended to abandon her legal residence in the neighboring school district or that she intended to become a resident of respondent school district. A residence is not lost until another residence is established through both intent and action expressing such intent (Matter of Gladwin et al. v. Power et al. 21 A.D.2d 665, 249 N.Y.S.2d 980, aff'd 14 N.Y.2d 771, 250 N.Y.S.2d 807 (1964); Matter of Callahan, 10 Ed. Dept. Rep. 66 (1970); Matter of Lundborg, 12 id. 268 (1973)."

Under such circumstances, the Commissioner interpreted Section 3202.1 as not requiring the school district in which petitioner lived to provide a free education, since that was not petitioner's district of residence.

It would appear from the recent decision of the Commissioner of Education in Matter of Appeal of Richards, _____ Ed.Dept. _____, that the Freeport Union Free School District is the district responsible for the education of petitioner's children. While Freeport's counsel has attempted to distinguish this decision from the instant matter, a reading of Richards requires a similar finding in this proceeding. Freeport's attorney alleges that there were significantly more ties between the petitioner in Richards than the petitioner in this proceeding. However, a review of the facts does not demonstrate such significant differences. Moreover, it was not on the basis of those contacts that the Commissioner of Education made his ruling. The foundation for the Commissioner's decision is found on the last page of that decision, where he states:

> "It is well settled that a residence is not lost until another residence is established through both intent and action expressing such intent (Matter of Wadas, 21 Ed.Dept. Rep. 577; Matter of Lundborg, 12 id. 268; Matter of Callahan, 10 id. 66). The record before me indicates that petitioner was required to leave her home because of circumstances beyond her control. Petitioner has not expressed or implied any intention of abandoning her residence in the district or any intention of establishing a residence in another district. Until such an intent is expressed or can be inferred from her actions, petitioner and her children have not lost their status as residents of the Port Chester-Rye Union Free School District. Petitioner and her children are currently homeless and their present living arrangement in a motel is temporary. Temporary absence does not constitute the establishment of a residence in the district where the temporary abode is located or the abandonment of a permanent residence (Matter of Hodge, 27 St.Dept.Rep. 690). Consequently, I find that petitioner is currently a resident of respondent district, and her children are entitled to attend its schools on a tuition free basis."

It is a principle of statutory construction that the courts should defer to the agency or officer who has been given responsibility for the enforcement of statutes. In the area of education law, this is the Commissioner of Education. In Matter of Lezette v. Board of Education, 35 N.Y.2d 272, 281, 360 N.Y.S.2d 869, 876, the New York State Court of Appeals ruled:

> "It is a cardinal principle of construction that, '[i]n case of doubt, or ambiguity, in the law it is a well-known rule that the practical construction that

> has been given to a law by those charged with the duty of enforcing it, as well as those for whose benefit it was passed, takes on almost the force of judicial interpretation [cases cired]'. (Town of Amherst v. County of Erie, 236 App. Div. 58, 61, aff'd. 260 N.Y. 361-370). In Matter of Howard v. Wyman, (28 N.Y.2d 434, 438) former Chief Judge Fuld wrote for the Court, '[i]t is well settled that the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld."

See also Matter of Ablondi v. Commissioner of Education et al., 54 A.D.2d 507; Matter of Mugavin v. Nyquist, 48 A.D.2d 727, aff'd. 39 N.Y.2d 1003; Matter of Chauvel v. Nyquist et al., 43 N.Y.2d 48; and Matter of Lafko v. Wappingers Central School District, 75 A.D.2d 926.

The interpretation of the statute by the Commissioner has also been concurred in by Surrogate Radigan, Nassau County, in Matter of Montcrieffe, 121 Misc.2d 395, 467 N.Y.S.2d 812, 813 (1983):

> "Residence for public school education purposes envisions a physical presence with the intention of remaining."

It is clear in rendering his decision that Surrogate Radigan did not choose to follow the prior decision of Vaughn v. Board of Education, 64 Misc.2d 60, 314 N.Y.S.2d 266, the case chiefly relied upon by the Freeport school district. The holding in Vaughn has not been followed by any other court of record, nor by the Commissioner of Education, as best as can be determined. All decisions define residence as requiring an intention of permanency.

However, Vaughn can be distinguished on its facts from the instant proceeding. Certainly, the families in Vaughn showed an intention to reside within the Uniondale school district for a period longer than is true in this proceeding. It appears from the factual statement that the petitioners in Vaughn occupied the premises in question in late spring or early summer and were still in occupancy upon the date of the decision of the Court in September. Moreover, the families in Vaughn occupied the premises on a month-to-month basis. Finally, it was the petitioners in Vaughn who were claiming the right to be admitted to the Uniondale schools, thus evidencing an intention on their part that they be considered residents of Uniondale.

In the instant proceeding, petitioner and her children occupy a temporary emergency shelter. By its nature, petitioner is not expected to occupy the premises for a period longer than a few days or perhaps a few weeks at the most. Even more importantly, petitioner has evidenced that it is not her intention to be considered a resident of Roosevelt, but rather has maintained that she is a resident of the Freeport school district, the last school district in which she maintained a "residence", as contemplated by the Education Law. Under these circumstances, the decision in Vaughn, even if considered correct law, must be held to be inapposite.

As had been noted by the Court, petitioner was required to take up shelter in Bethany House by the Department of Social Services. Such action was neither of petitioner's choosing nor desire; it was forced upon her. Such circumstances are analagous to an individual being placed in a prison, a hospital or some other type of institution. In each such case, it has been held by the courts of this state that a residence does not arise.

In Westbury v. Amityville Union Free School District, 106 Misc.2d 189, 431 N.Y.S.2d 641 (1980), Mr. Justice Wager, sitting in this Court, was asked to decide whether incarceration in a prison represented residence as contemplated by Section 3202 of the Education Law. In relying upon People v. Cady, 143 N.Y. 100, he found such a contention "preposterous". Justice Wager stated at 643:

> "The voluntary relinquishment of a prior residence and the voluntary establishment of a new place of abode, albeit institutional, is an essential ingredient in a determination of residence or domicile." (emphasis added)

In Corr v. Westchester County Social Services Department, 33 N.Y.2d 111, 350 N.Y.S.2d 401, in reviewing the residence of an individual who was hospitalized, the Court of Appeals stated at page 115:

> "Ordinarily, a patient or inmate of an institution does not gain or lose a residence or domicile, but retains the domicile he had when he entered the institution ...." (citations omitted)

See also Seitelman v. Lavine, 36 N.Y.2d 101; Casey v. Lavine, 54 A.D.2d 250, 388 N.Y.S.2d 159.

> "An established domicile, whether of origin or choice, is presumed to continue until shown to have been changed and, where no change is alleged or proved, such presumption is conclusive. Otherwise stated, there is a legal presumption against a change of domicile." (49 N.Y. Jur., Domicile and Residence, Section 48)

The Freeport Union Free School District has failed to effectively rebut such presumption.

At the argument of this matter, the Court raised questions as to what rights petitioner enjoyed by virtue of her occupancy at Bethany House. The only information available was that children who have been temporarily placed in Bethany House have not been permitted to attend the Roosevelt schools as resident students.

Additionally, Article II, Section 4, of the New York State Constitution addresses the voting rights of petitioner. That section states:

> "For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence ... while kept in an alms-house, or other asylum, or institution wholly or partly supported at public expense or by charity ..."

Clearly, under this section of the State constitution, petitioner would be deemed, for the purposes of voting, a resident of the Freeport school district.

A review of other subsections of Section 3202 of the Education Law also demonstrates that it was not the intention of the state legislature to make Roosevelt responsible for the education of children such as petitioner's. Section 3202.4 establishes that children placed in an orphan asylum or similar institution are not to be deemed residents of the school district in which such institution is located. Section 4.a provides that the cost of instruction of pupils placed in a family home at board by a social service agency shall be borne by the school district in which such pupil resided at the time that the social service agency assumed responsibility.

The Roosevelt school district recognizes the concern shown by the court for the welfare of petitioner's children. In large measure, Roosevelt shares that concern. However, Roosevelt also bears a responsibility to the taxpayers and children who reside in that economically depressed school district. The Court, in exercising its authority in this particular case, must be careful to do so in a manner that will not cause great damage to the overall fabric of the Roosevelt school district.

The Court has the power to ensure that petitioner's children receive a proper education. It can bring about this reuslt in conformity with the past precedents of both the Commissioner of Education and the courts of this state. By finding that Freeport is the district responsible for the education of the children, two alternatives may then exist.

The children may attend the Freeport schools. Under those circumstances, it would presumably be the obligation of the petitioner to get the children to some point in the Freeport school district where they could be transported to their respective schools. Such a process would be neither time-consuming nor expensive, based upon the very small geographic area of the Roosevelt school district and its proximity to Freeport. Alternatively, if agreed to by Roosevelt, Freeport might contract with Roosevelt to allow the children to attend the Roosevelt schools, based upon a tuition payment by Freeport to Roosevelt. Such arrangements are frequently entered into between school districts.

If, on the other hand, this Court were to hold that Roosevelt is responsible for the education of the children, such a determination would wreak havoc, not only in Roosevelt but in any other school district within the state which has a temporary shelter within its geographic boundries. Those school districts would become revolving doors. Children would come in and out of those schools almost on a daily basis, since the occupancy of these temporary shelters are of such a transient nature. School districts would not be able to establish regular classes, since the ages of these transient children would vary and they could not all be assigned to the same grade or level. One week, you may have a number of children at the third grade level housed in the temporary shelter, and the next week, their place may be taken by junior high school or high school students. The district could not plan ahead for these occurrences.

Such a turnstyle situation would be disruptive of the education of those students already enrolled in the class, as well as those children from Bethany House. The welfare of those students should require that they continue to attend the schools that they had previously attended until such time as a new residence is acquired. This conforms with both common sense and the established law.

CONCLUSION

THIS COURT MUST DETERMINE THAT ROOSEVELT IS NOT RESPONSIBLE FOR THE EDUCATION OF PETITIONER'S CHILDREN.

Dated: February 19, 1986

Respectfully submitted,

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Robert E. Sapir,
Of Counsel

III. CASES AND PLEADINGS

A. Decided Cases

3. Mason v. Board of Education, Freeport Union School District

Nason

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
--x

on behalf of her minor
children,

VERIFIED COMPLAINT

Plaintiff,

-against-

BOARD OF EDUCATION, FREEPORT UNION FREE
SCHOOL DISTRICT, and JOHN E. BIERWIRTH, III,
as Superintendent of Schools,

Defendants.
--x

Plaintiff, by her attorney, complaining of the defendants, alleges as follows:

PARTIES

1. Plaintiff is the mother of age seventeen, age seventeen, age fifteen, age thirteen, and age ten. Plaintiff and her children are homeless. They are currently staying at Better Way, an emergency shelter at 124 West Fulton Street, Long Beach, New York.

2. Defendant BOARD OF EDUCATION is a corporate body charged with the management and control of educational affairs and with implementation of the Education Law within the Freeport Union Free School District ("the District").

3. Defendant JOHN E. BIERWIRTH, III is Superintendent of Schools of the District. As such, pursuant to the Education Law, he is responsible for the administration and management of educational matters within the District.

FACTS

4. From 1976 to October 15, 1986, plaintiff and her children resided at 11 Leonard Avenue, Freeport, New York within the boundaries of the District.

5. Plaintiff's children have been enrolled in the public schools operated by the District throughout the time they have resided in Freeport. In October, 1986, and were attending Freeport High School; was attending Dodd Junior High School; and was attending the Atkinson School.

6. In 1986, plaintiff's landlord brought a holdover eviction proceeding against plaintiff in Nassau County District Court. The court entered judgment for the landlord and issued a warrant of eviction.

7. On October 15, 1986, the Nassau County Sheriff executed the warrant and evicted plaintiff and her children from their home.

8. Plaintiff and her children are recipients of public assistance from the Nassau County Department of Social Services (DSS). DSS has placed them in emergency housing from the time of their eviction to the present.

9. From October 15 to October 19, 1986, plaintiff and her children stayed at 292 North Main Street in Freeport, New York. From October 20 to October 22, 1986, they stayed at the Raceway Inn Motel in Westbury, New York. From October 23 to November 6, 1986, they stayed at 146 West Fulton Street, Roosevelt, New York. From November 7 to November 11, 1986 they again stayed at the Raceway Inn Motel. From November 12 to

December 11, 1986, they stayed at Better Way, an emergency shelter at 124 West Fulton Street, Long Beach, New York. From December 12, 1986 to February 1, 1987, they stayed in one room at 26 Austral Avenue, Glen Cove, New York. From February 2 to February 3, 1987, they again stayed at the Raceway Inn Motel. Since February 4, 1987, they have been staying at Better Way. All placements have been arranged by D.S.S.

10. On or about November 7, 1986, plaintiff's five children were sent home from their respective schools. Plaintiff was advised that her children could no longer attend their schools because they had moved outside the district.

11. Upon information and belief, plaintiff's children were excluded from school at the direction of and/or pursuant to policies set by defendants.

12. Defendants have refused to permit any of plaintiff's children to attend schoold since November 15, 1986.

13. Defendants have not advised plaintiff that she has a right to contest their decision, nor have they given her an opportunity to contest their decision.

14. None of plaintiff's children have attended school since November 7, 1986.

15. Defendants have not provided any of plaintiff's children with alternative instruction or with any educational services since November 7, 1986.

16. Plaintiff and her children have not abandoned their residence in Freeport, nor have they established residence in any other school district.

17. Plaintiff and her children are residents of the District.

FIRST CAUSE OF ACTION

18. Article XI, §1 of the New York State Constitution provides that all children of New York State are entitled to a free public education.

19. Defendants are acting in violation of law.

SECOND CAUSE OF ACTION

20. Education Law §3202 subd. 1 provides, *inter alia*:

> A person over five and under twenty-one years of age who has not received a high school diploma is entitled to attend the public schools maintained in the district in which such person resides without the payment of tuition.

21. Defendants are acting in violation of law.

THIRD CAUSE OF ACTION

22. Defendants' actions have caused and continue to cause plaintiff and her children irreparable harm for which there is no adequate remedy at law.

FOURTH CAUSE OF ACTION

23. Defendants have excluded plaintiff's children from school without due process of law.

24. Defendants are liable in damages under 42 U.S.C. §1983.

WHEREFORE, plaintiff requests judgment as follows:

1. DECLARING that defendants' actions in excluding plaintiff's children from school are in violation of law;

2. ENJOINING defendants, their agents and employees from continuing to exclude plaintiff's children from school;

3. DIRECTING defendants to immediately readmit plaintiff's children to their respective schools;

4. DIRECTING defendants to provide plaintiff's children with additional educational services and/or instruction to compensate for those lost by their unlawful exclusion from school;

5. AWARDING plaintiff damages in the amount of $50,000;

6. AWARDING plaintiff reasonable attorney's fees, costs, and disbursements; and

7. GRANTING such other and further relief as may be just and proper.

Dated: Hempstead, New York
February 11, 1987

LEONARD S. CLARK
EDWARD LUBAN of counsel
NASSAU/SUFFOLK LAW SERVICES
COMMITTEE, INC.,
Attorney for Plaintiff
91 North Franklin Street
Hempstead, New York 11550
(516) 292-8100

STATEMENT

This is an action for declaratory and injunctive relief and damages. Plaintiff contends that defendants have unlawfully excluded her children from school. She has moved by order to show cause for a preliminary injunction enjoining defendants from continuing to exclude her children from school and for poor person relief. This memorandum is submitted in support of plaintiff's motion for a preliminary injunction.

ARGUMENT

AS PLAINTIFF AND HER CHILDREN HAVE NOT LOST THEIR RESIDENCE IN FREEPORT, PLAINTIFF'S CHILDREN ARE ENTITLED TO ATTEND THE FREEPORT PUBLIC SCHOOLS

Education Law §3302 subd. 1 provides, *inter alia*:

> A person over five and under twenty-one years of age who has not received a high school diploma is entitled to attend the public schools maintained in the district in which such person resides without the payment of tuition.

The question whether a person resides in a particular school district is a "mixed question of law and fact." *People ex rel. Brooklyn Children's Aid Society v. Hendrickson*, 125 App. Div. 256, 109 N.Y.S. 403 (2nd Dep't. 1908), aff'd., 196 N.Y. 551, 90 N.E.2nd 1163 (1909); *Matter of Van Curran and Knop*, 18 Ed. Dept. Rep. 523, 524 (1979); *Matter of Richards v. Port Chester-Rye Union Free School District*, ____ Ed. Dept. Rep. ___ (Dec. No. 11490, July 17, 1985). There is no single indicator which is conclusive, *Matter of Manning*, 24 Ed. Dept. Rep. 33 (1984), but among the relevant factors are physical presence and the person's intent with respect to residence. *Vaughn v. Board of Education of Union Free School District No. 2, Town of Hempstead*, 64 Misc.2d 60, 314 N.Y.S.2d 266 (Sup. Ct. Nass. Co. 1970); *Matter of Whiteman*, 24 Ed. Dept. Rep. 337 (1985).

Defendants have determined that plaintiff does not reside within the Freeport Union Free School District. Relying on Matter of Shelmiding, 22 Ed. Dept. Rep. 206 (1982), defendants assert that their determination is binding unless it is arbitrary, capricious, or unreasonable. In Schelmiding, the determination as to residence was made after a hearing before the Board of Education. Here, however, defendants have not given plaintiff any opportunity to contest their determination to exclude her children from school. Cf. Takeall by Rubinstein v. Ambach, 609 F. Supp. 81 (S.D.N.Y. 1985). In these circumstances, the court must closely scrutinize the facts to determine if defendants' determination is correct.

A residence is not lost until another is established through both intent and action expressing such intent. Matter of Callahan, 10 Ed. Dept. Rep. 66 (1970); Matter of Wadas, 21 Ed. Dept. Rep. 577 (1982); Matter of Richards, supra. Defendants do not dispute that plaintiff resided in Freeport for ten years, until October 15, 1986. Therefore, the question is whether she has lost her residence since she was evicted.

The Commissioner of Education has held that the residence of homeless students must be determined on a case by case basis. Matter of Richards, supra. The only reported decisions involving residence of homeless students are Richards and Delgado v. Freeport Public School District, 131 Misc.2d 102, 499 N.Y.S.2d

606 (Sup. Ct. Nass. Co. 1986). Defendants contend that this case is identical to Delgado and that Justice Murphy's decision in that case is controlling. However, the facts in this case are quite different from those in Delgado. To blindly follow Delgado, therefore, would be to ignore the case by case analysis required in any determination of residency.

The petitioner in Delgado had resided in Freeport for only twenty months before she became homeless. She moved to Suffolk County, then returned to Nassau where she was placed in a shelter. (Her housing in Suffolk was to be permanent housing but petitioner left because it was substandard. In any event, moving into what is intended to be permanent housing could certainly be construed as establishing a new residence.) At the time the case was decided, petitioner had been homeless for one month. Shortly afterward, she obtained permanent housing in the district in which the shelter was located.

Plaintiff's situation is very different. Plaintiff's affidavit and her reply affirmation set out the extensive ties she and her family have developed in their ten years of residence in Freeport. This stands in contrast to Delgado, where the court found that "petitioner has not established significant or determinative ties with Freeport." 499 N.Y.S. 2d at 608. Second, unlike petitioner in Delgado, plaintiff has not obtained permanent housing. All of her living arrangements since she was evicted have been temporary placements arranged through the Department of Social Services. Such temporary arrangements constitute neither abandonment of plaintiff's Freeport residence nor establishment of a new residence. Matter of Hodge, 27 St. Dept. Rep. 690 (Ed. Dept. 1922). Thus, plaintiff still has no residence other than Freeport. Finally, in Delgado the court noted that there was no evidence how long petitioner would have her abode within the Roosevelt district. In this case, however, there is evidence that plaintiff will be relocated again in the immediate future. There is also a record of more than four months in which plaintiff has already been relocated eight times. To extend Delgado and hold that plaintiff's children should attend the schools of whatever district in which they happen to be sheltered would be to ignore this record. Such a result would not offer plaintiff's children any solution at all.

On the other hand, the facts of this case are analagous to those in Matter of Richards, supra. Accordingly, the reasoning of that decision is applicable to this case as well. Plaintiff should be held to be a resident of Freeport, and defendants should be directed to admit her children to school.

CONCLUSION

FOR THE FOREGOING REASONS, PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION SHOULD BE GRANTED

Dated: February 26, 1987
Hempstead, New York

LEONARD S. CLARK

BY: EDWARD LUBAN, of counsel
NASSAU/SUFFOLK LAW SERVICES
COMMITTEE, INC.
Attorney for Plaintiff
91 No. Franklin Street
Hempstead, New York 11550
516/292-8100

Mason

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
--X

, on behalf of her minor
children, et al,
Plaintiff,

-against-

BOARD OF EDUCATION, FREEPORT UNION
FREE SCHOOL DISTRICT, and JOHN E.
BIERWIRTH, III, as Superintendent of
Schools,
Defendants
--X.

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO MOTION

By Order to Show Cause dated February 13, 1987, plaintiff has moved for a mandatory injunction compelling defendant FREEPORT UNION FREE SCHOOL DISTRICT and its Superintendent of Schools to enroll her five children in defendant FREEPORT'S public schools, although the moving papers and the complaint allege that plaintiff and her children presently reside in Long Beach, New York, which is within the jurisdictional area, of the LONG BEACH CITY SCHOOL DISTRICT.

Defendant FREEPORT UNION FREE SCHOOL DISTRICT is a municipal corporation charged by law with the responsibility of providing free education to persons of designated age who reside within the geographical boundaries provided by law under its jurisdiction, to wit: generally to persons who reside in FREEPORT, NEW YORK. For such residents, such education is without charge; there is also provision in law for non-residents to be charged a tuition for such education outside their residential district. Addresses in Long Beach are not within FREEPORT'S statutory geographical area.

Section 3202 (1) of the Education Law provides:

> "A person over five and under twenty-one years of age who has not received a high school diploma is entitled to attend the public schools maintained in the district in which such person resides without the payment of tuition."

The moving papers allege that plaintiff and her five children presently reside at 124 West Fulton Street, Long Beach, New York, which she describes as a temporary shelter. Plaintiff further alleges that she and the children resided in Freeport from 1976 until October 15, 1986; that thereafter for four days she resided at another Freeport address; then lived in a motel in Westbury, then in Roosevelt, again in Westbury, and then in Long Beach. Plaintiff states they then resided in Glen Cove, and since February 4, 1987 she and the children have resided at the noted address in Long Beach. Plaintiff further states that in November the children ceased attending school, after the FREEPORT school authoritities determined that the children were no longer residing in FREEPORT.

Plaintiff does not allege that she has attempted to register the children for school in LONG BEACH, or elsewhere; apparently, according to the moving papers, after the children stopped attending school in FREEPORT, she merely keeps them at home, watching television. The moving papers do not allege that plaintiff has any particular ties to FREEPORT, such as employment or church attendance, other than the fact that she resided there until October, 1986.

Plaintiff does not discuss in her papers how the children would get from their present residence in LONG BEACH to the three different schools the children previously attended in FREEPORT; she does not now request an Order requiring FREEPORT to "bus" the children, but it is noteworthy that she alleges that she does not own a car.

POINT I

UPON THE FACTS ALLEGED, NO RELIEF IS AVAILABLE TO PLAINTIFF AGAINST THESE DEFENDANTS

Whether a child is a resident of a particular school district, is, for the purposes of the Education Law, a "mixed question of law and fact", People v. Hendrickson, 125 App.Div. 256, 109 N.Y.Supp. 403, aff'd 196 N.Y. 551 (1908). In the case at Bar, for the purposes of the pending motion only, defendants have not contested any of the facts alleged by plaintiff, so this matter rests in this Court as a question of law.

"The burden of proving residence in the district is upon petitioner", Matter of Conine, 9 Ed.Dept.Rep. 32, accord, Matter of Fenton, 15 Ed.Dept.Rep. 100; Matter of Ven Curran and Knop, 18 Ed.Dept.Rep. 523.

Plaintiff alleges that the FREEPORT school authorities sent the children home in November, 1986 upon a determination that they were no longer residing in FREEPORT. That determination is binding unless shown to be arbitrary or capricious:

> "A determination by a board of education or a superintendent of schools that a child is not a resident of the school district will not be set aside unless it is established by the petitioner to be arbitrary, capricious or unreasonable."
> Matter of Shelmiding
> 22 Ed.Dept.Rep. 206

Accord, Matter of Buglione, 14 Ed.Dept.Rep. 220, both cases cited in Matter of Delago, 24 Ed.Dept.Rep. __, Decision No. 11394 dated January 30, 1985 by the New York Commissioner of Education.

In Vaughn v. Board of Education, Hempstead Union Free School District, 64 Misc.2d 60, 314 N.Y.S.2d 266 (1970), MR. JUSTICE DANIEL G. ALBERT of this Court held:

> "The term 'residence' has been defined as requiring merely 'bodily presence as an inhabitant in a given place'.... But where, as here, the parents and guardians of the children have no other residence and the children dwell with them within the school district, although such residence may not be accompanied by an intention to dwell there permanently, the obligation of the district to provide such children with a free education is clear and unequivocal."

In the case at Bar, the children are presently residing in Long Beach. It is thus clearly the statutory and constitutional duty of the LONG BEACH CITY SCHOOL DISTRICT to provide the children with an education, even though the plaintiff may look upon such residence as temporary.

In the Vaughn case, MR. JUSTICE ALBERT continued:

> "The fact remains that at the present time the petitioners reside within the Uniondale school district within the meaning of Section 3202, subdivision 1, of the Education Law. Therefore, their infant children and those infants who reside in their households and to whom they stand in loco parentis are clearly entitled to attend the Uniondale public schools.

Plaintiff cites for authority the Decision of the Commissioner in Richards v. Board of Education Port Chester-Rye UFSD, Decision No. 11490 of July 17, 1985. The decisions of JUSTICE ALBERT in Vaughn and of JUSTICE MURPHY in Delgado reached contrary results from that reached in Richards, but in fact the application of law is the same. The Richards decision stands for a proposition directly contrary to that proffered by plaintiff; in Richards

*Petitioner had received a certificate from a federal housing subsidy program for housing in Port Chester
*Petitioner had her mailing address in Port Chester
*Petitioner had extensive family in Port Chester
*Petitioner attended church in Port Chester
*Petitioner was required to report to the Department of Social Services located within Port Chester for an emergency housing placement
*Petitioner had her primary community ties in Port Chester
*Petitioner had diligently attempted to locate housing for herself in Port Chester
*Petitioner had weekly requested the Department of Social Services to find her housing within Port Chester
*Petitioner spent all her time in Port Chester
*Petitioner returned to her assigned motels only to sleep.

In the case at Bar, plaintiff has failed to allege a single one of the many factual guidelines delineated by the Commissioner in Richards, where the decision was careful to point out:

> "Determinations of residency are mixed questions of law and fact which do not lend themselves to general declarations. Rather, each circumstance must be reviewed individually to determine the student's residence."

The Commissioner continued:

> "Nor do policy considerations lead inevitably to a conclusion that all homeless students should be required to return to the distraict in which they resided at the time they became homeless."

The Commissioner noted:

> "In certain circumstances such students are placed in temporary housing a great distance from their prior home, rendering transportation to that district both impractical and undesirable. Unless and until legislation is enacted specifically addressing the education of homeless children, the residence of such children must be determined on a case by case basis."

The Commissioner then quoted his earlier decision in Matter of Conine, supra:

> "But, unless appellant proves that the children are residents of respondent school district or come within one of the exceptions to the general rule, they are not entitled to free tuition in this district."

It is thus apparent that plaintiff has made neither the factual or legal showing of being entitled to relief in this proceeding against the defendants. In fact, it is clear that she has sued the wrong school district; the legal responsibility of educating plaintiff's children rests upon the LONG BEACH CITY SCHOOL DISTRICT.

In the Delgado case, mentioned above, where also the petitioner had claimed to be residing outside of FREEPORT'S legal geographical area, but in temporary housing, JUSTICE MURPHY wrote:

> "The petitioner and her children live in Roosevelt. Thus, they enjoy all the rights of their neighbors, including the right of each of these two children to be educated in the Roosevelt schools without the payment of tuition. It is quite irrelevant to a resolution of this dispute whether the residency will be short or long, temporary or permanent. The question of residency is and must be a question of fact and not surmise."

JUSTICE MURPHY continued:

> "The petitioner seeks to have her children registered in Freeport schools. Her preference, however, is not at all governing.... At the present time, the petitioner and her children have no abode except that which they have in Roosevelt nor is there any evidence how long they shall have that abode or when or where their next abode, if any, will be."

And, the Court carefully pointed out:

> "For the guidance of the parties this Court finds that petitioner has not established significant or determinative ties with Freeport. What ties were shown amount merely to living there."

JUSTICE MURPHY also dealt with the problems of transportation:

> "The problem of finding a safe and suitable way to deliver these children to Freeport schools from their abode in Roosevelt has not been clarified. How they would be returned to Roosevelt is equally unclear. It just doesn't make sense to have children living in Roosevelt go back to Freeport for further education when other children living in the same abode or on the same street are attended to by their own available and convenient school facilities. The proposed resort to Freeport schools would, at once, make them 'visitors' both where they go to school and in their home community of Roosevelt."

In the quoted Delgado case, where, there, also, there was insufficient time for defendnts to make a cross-motion to dismiss on the return date of the order to show cause, MR. JUSTICE MURPHY searched the record and dismissed the proceeding as to FREEPORT. This Honorable Court must do the same.

CONCLUSION

THE MOTION MUST BE DENIED AND THE ACTION DISMISSED AS TO BOTH DEFENDANTS.

Respectfully submitted,

IRVING M. WALL
Attorney for Defendants

ALFRED W. CHARLES
of counsel

III. CASES AND PLEADINGS

A. Decided Cases

4. Vingara v. Borough of Wrightstown

FACSIMILE

SUPERIOR COURT OF
NEW JERSEY CHANCERY
DIVISION, BURLINGTON
COUNTY
DOCKET NO. C-7545-87

GLORIA VINGARA, RUTH BARGER *
HELEN WALKER, KAREN BULLUCK, *
and ALFRED A. SLOCUM, PUBLIC *
ADVOCATE OF NEW JERSEY, *
*
Plaintiffs, *
*
v. *
*
BOROUGH OF WRIGHTSTOWN, *
*
Defendant. *

This matter being opened to the court on the application of Frederick W. Hardt, attorney for the defendant, the Borough of Wrightstown, and the court having considered the moving papers, and

IT APPEARING THAT, on November 9, 1987, the defendant Borough of Wrightstown adopted Ordinance No. 13-1987, copy attached hereto, in which the defendant Borough amended its zoning ordinance by deleting the 30 day limit on motel occupancy that is the subject of plaintiffs' challenge in this matter, and good cause appearing, IT IS on this 5th day of January, 1988

ORDERED AND ADJUDGED that the complaint filed by the plaintiff is hereby dismissed on the grounds that the claims asserted by plaintiffs in the complaint have been rendered moot by the defendant's adoption of Ordinance No. 13-1987 on November 9, 1987

s/HAROLD S. WELLS, III, J.S.C.

Sept 29, 1987

HAROLD B. [illegible]

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ALFRED A. SLOCUM, PUBLIC ADVOCATE
DEPARTMENT OF THE PUBLIC ADVOCATE
DIVISION OF PUBLIC INTEREST ADVOCACY
BY: DAVID G. SCIARRA
SUSAN R. OXFORD
ASSISTANT DEPUTY PUBLIC ADVOCATES
CN - 850
TRENTON, NEW JERSEY 08625
(609) 292-1692

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
DOCKET NO.

GLORIA VINGARA, RUTH BARGER, HELEN WALKER, KAREN BULLUCK, and ALFRED A. SLOCUM, PUBLIC ADVOCATE OF NEW JERSEY,

Plaintiffs,

v.

BOROUGH OF WRIGHTSTOWN,

Defendant.

Civil Action

ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINTS

This matter being opened to the Court by Alfred A. Slocum, Public Advocate of the State of New Jersey, with David G. Sciarra, Assistant Deputy Public Advocate, appearing on behalf of plaintiffs, and it appearing to the Court from the complaint and the affidavits annexed hereto that the plaintiffs will suffer immediate and irreparable harm before notice of motion can be served and hearing had on an application for a preliminary injunction in this action:

It is on this 29th day of Sept 1987

ORDERED that the defendant Borough of Wrightstown show cause before the Superior Court of New Jersey, Burlington County on Friday, the 9th day of October 1987, at 9:00 o'clock in the forenoon or as soon thereafter as counsel can be heard why an order should not be issued restraining and enjoining the defendant from undertaking an action pursuant to Section 14-6.5b.4 of the defendant's zoning ordinance to remove plaintiffs and any other homeless families presently residing in motels within the Borough of Wrightstown until a final hearing on this matter.

IT IS FURTHER ORDERED that defendant Borough of Wnightstown is hereby restrained and enjoined from enforcing any violation of Section 14-6.5b.4 of the defendant's zoning code either through taking direct action against the plaintiffs and any other homeless family and/or through taking indirect action against any motel owner who provides emergency housing to homeless families.

IT IS FURTHER ORDERED that the restraints contained in this order shall expire on the return day hereof or until further order of the Court.

IT IS FURTHER ORDERED that true but uncertified copies of the complaint and the affidavits attached thereto and of this order be served upon the defendant within 2 days from the date hereof.

Harold B. Wells

Harold B. Wells, III, J.S.C.

State of New Jersey
DEPARTMENT OF THE PUBLIC ADVOCATE
DIVISION OF PUBLIC INTEREST ADVOCACY
CN 850
TRENTON, NEW JERSEY 08625

ALFRED A. SLOCUM
PUBLIC ADVOCATE

RICHARD E. SHAPIRO
DIRECTOR
TEL: 609-292-1693

September 29, 1987

Honorable Martin L. Haines, J.S.C.
Superior Court of New Jersey
Courts Facility
Mt. Holly, New Jersey 08060

Re: Vingara, et al. v. Borough of Wrightstown

Dear Judge Haines:

Please accept the following letter brief from the plaintiffs and the Public Advocate of New Jersey, Alfred A. Slocum, in support of their application for temporary restraints in the above-captioned matter. In this application, plaintiffs and the Public Advocate seek an order enjoining the defendant Borough of Wrightstown from undertaking any action to remove plaintiffs and other homeless families from the McGuire/Holiday Motel in Wrightstown on October 1. On that day, the defendant intends to enforce Section 14-6.5b.4 of the defendant's zoning ordinance that limits occupancy of motel rooms in the defendant Borough to a maximum of 30 days.

As we explain below, the criteria for issuance of emergent injunctive relief are clearly satisfied in this application. See Crowe v. DiGioia, 90 N.J. 126, 132 (1982). Accordingly, the Court should grant the requested relief to ensure that homeless families and their children can receive adequate emergency shelter, including appropriate educational opportunities, without infringement from arbitrary, unreasonable and impermissible municipal time limits.

First, removal of plaintiffs from their emergency shelter on October 1 will seriously disrupt the lives of plaintiffs and their children. Plaintiffs will be forced to assemble all of their belongings and relocate into a different emergency shelter most likely in another motel, in some as yet unspecified community. Most importantly, however, plaintiffs will be required to transfer their school age children from the New Hanover Elementary School, the school which these children have attended since the first day of the current school year, or since September 1987. Many of these children are classified as having learning problems and, as a result, are enrolled in remedial reading programs or classes for children with learning disabilities. If plaintiffs' children are compelled to transfer from the New Hanover School into another school district, these children will suffer irreparable harm by being deprived of the consistent and stable educational opportunity that is available to children of families that reside in Wrightstown.

Second, the material facts underlying this application are uncontroverted. These undisputed facts can be summarized as follows:

1. the plaintiffs are homeless and have young children of school age in their families.

2. The plaintiffs are indigent and their only income consists of an AFDC grant and food stamps from the Burlington County Welfare Board (BCWB).

3. Because they are homeless, plaintiffs are eligible for emergency shelter assistance (EA) from the BCWB pursuant to N.J.A.C. 10:82-5.10. Under an injunction issued by the Appellate Division in Maticka v. City of Atlantic City, 214 N.J. Super. 434 (App. Div. 1987), the BCWB must provide homeless families with emergency shelter without regard to any time limit and until such time as the family secures permanent housing.

4. Under the EA program, the BCWB provided emergency shelter to plaintiffs in rooms in the McGuire/Holiday Motel in Wrightstown, New Jersey.

5. In early September 1987, the plaintiffs enrolled their children in the New Hanover Elementary School, the school that serves residents of Wrightstown.

6. The plaintiffs' children, on different days beginning September 1987, began attending the New Hanover Elementary School.

7. Shortly after plaintiffs's children began attending the New Hanover Elementary School, on or about September 11, 1987, the defendant took action to enforce Section 14.6.5b.4. of the defendant's zoning ordinance. This Section provides that "[T]here shall be a residence *limitation on all guests* (in rooms in motels licensed under the zoning code) *of 30 days maximum*." (emphasis supplied). Specifically, the defendant Borough notified the owner of the McGuire/Holiday Motel and the BCWB that the plaintiffs and other homeless families had occupied their rooms for more than 30 days and were, therefore, in violation of Section 14-6.5b.4. Further, defendant instructed the motel owner and the BCWB to immediately remove plaintiffs and other homeless families from the motel and, if the motel owner failed to comply, enforcement proceedings would be instituted against him by the defendant.

8. Defendant objects to providing education to plaintiffs' children at the New Hanover Elementary School on the basis that these children are not permanent residents of Wrightstown and that the cost of educating

homeless children will be borne by the residents of Wrightstown.

9. As a result of defendant's enforcement action, the BCWB relocated approximately 14 homeless families from Wrightstown into other communities beginning September 11, 1987. The plaintiffs, however, have refused to move despite directives from the BCWB that they must do so pursuant to the 30 day time limit in defendant's zoning ordinance.

10. On September 15, 1987, the defendant, at the request of the plaintiffs and the BCWB, extended the deadline for plaintiffs' removal until October 1.

11. The removal of plaintiffs under Section 14-6.5b.4 of defendant's ordinance will cause plaintiffs serious hardship in that they will have to move all of their personal belongings and their families to another motel in some other community. This type of abrupt relocation will disrupt plaintiffs' attempts to provide a stable and healthy living environment for themselves and their children and will seriously hinder plaintiffs' efforts to locate permanent housing. Furthermore, plaintiffs'

children will be required to transfer from the New Hanover Elementary School into a different school. If required to transfer, these children will suffer irreparable harm by having their educational program at the New Hanover School completely disrupted and by having to enroll in another school system .

Third, the plaintifs can demonstrate a likelihood of success on the merits of the claims in their complaint. Plaintiffs will briefly describe below the emergency assistance or EA program under which they are receiving emergency shelter from the BCWB. Then plaintiffs will discuss the likelihood of success on each of their claims against defendant's ordinance.

1. The EA Program

In this matter, plaintiffs have been provided with emergency shelter in the McGuire/Holiday Motel by the BCWB through the emergency assistance (EA) program. Emergency assistance is "a component of the overall plan of assistance for dependent children embodied by that [the AFDC Law] legislation." Maticka v. City of Atlantic City, 216 N.J. Super. 434, 446 (App. Div. 1987). In the AFDC Law, the Legislature established a comprehensive system of aid and assistance "[T]o provide for the care of eligible dependent children in their own homes . . . . under standards compatible with decency and health." N.J.S.A.

44:10-1 et seq. The Legislature also directed the Department of Human Services (DHS) to issue "all necessary rules and regulations" in order, inter alia, "[T]o assure that the program shall be in effect in all counties of the state and be mandatory upon them." N.J.S.A. 44:10-3(a). Furthermore, the AFDC Law requires that county welfare agencies (CWA's) be established in each county and that the CWA's directly provide aid and assistance to eligible families in accordance with DHS' regulations. In pertinent part, N.J.S.A. 44:10-2 provides that:

> Eligible dependent children living in New Jersey and the parent or parents or relative or relatives with whom they are living shall be entitled to financial assistance and other services from the county welfare agency of the county in which they reside.

Pursuant to its express authority under the AFDC Law, the DHS has implemented not only a program of regular monthly assistance payments, but also an emergency assistance program for AFDC families who become homeless. N.J.A.C. 10:82-5.10 directs county welfare agencies to provide "adequate emergency shelter" to homeless families. The elements of this regulation are described by the Appellate Division in Maticka v. City of Atlantic City, supra at 439:

> N.J.A.C. 10:82-5.10(c) authorizes emergency assistance for families with dependent children
>
> [w]hen there has been substantial loss of shelter, food, clothing, or household furnishings by fire, flood or other similar natural disaster, or when , because of an emergent situation over

> which they had no control or opportunity to plan in advance, the eligible unit is in a state of homelessness and the county welfare agency determines that the providing of shelter and/or food and/or emergency clothing, and/or minimum essential house furnishings are necessary for health and safety. . . .

> Subparagraph (1) of that section, as amended effective June 1986, imposes a maximum 90-day time limitation on the grant of emergency assistance for shelter by restricting assistance to a "temporary period not to exceed two calendar months following the month in which the state of homelessness first becomes known to the county welfare agency."

In Maticka, the Public Advocate challenged the 60 to 90 day time limitation on emergency shelter in N.J.A.C. 10:82-5.10(c) on the basis that this time limit "provide(s) an insufficient time for obtaining new housing by displaced families" and, therefore, violates the legislative objectives of the AFDC Law. Id. at 439. Although Judge Sylvia Pressler concluded that the Court could not "definitively assess the validity" of the time limitation, the Court directed the DHS to conduct comprehensive rule-making proceedings to determine what, if any, time limit is appropriate to achieve the statutory purposes for AFDC. Id. at 455. Furthermore, the Maticka court enjoined the DHS and CWAs' throughout the state from employing the time limit to terminate emergency shelter until the DHS completes its rule-making proceedings. Id. at 456.

Following the Maticka decision, the DHS issued program instruction No. 87-2-2 (February 13, 1987) (attached) which advises all CWA's that "[A]pplication of the time limitation on the provisions of emergency assistance set forth in N.J.A.C. 10:82-5.10(c) is "suspended until further notice."

In the face of this comprehensive, state-supervised scheme for providing adequate emergency shelter to homeless families under the AFDC Law and the EA regulation, the defendant in this matter is seeking to enforce its own 30 day limitation on the time in which plaintiffs and other homeless families can receive emergency shelter in motels within its borders. Moreover, the defendant is enforcing the time limit as a means to relieve itself from the burden of educating plaintiffs' children and other homeless children in the public school system that serves Wrightstown residents. Under these circumstances, plaintiffs can demonstrate a likelihood that they will succeed in invalidating defendant's policy and practice on several distinct grounds.

2. Defendant's Time Limit Directly Conflicts With State Law and Public Policy

Plaintiffs contend that the defendant's 30 day time limitation on the occupancy of motel rooms by homeless families is invalid under well-established principles of state preemption. Specifically, the time limit is preempted by the duty placed upon the DHS and the BCWB to provide adequate emergency shelter for periods longer than 30 days under the AFDC Law, N.J.S.A. 44:10-1 et seq., the EA regulation, N.J.A.C. 10:82-5.10, and our state's public policy towards the homeless.

As the Supreme Court has stated, "[p]reemption is a judicially created principle based on the proposition that a municipality, which is an agent of the State, cannot act contrary to the State." Overlook Ter. Management v. Rent Control Bd. of W. New York, 71 N.J. 451, 461-62 (1976). To determine whether a municipal action is preempted, courts routinely analyze the municipal action against five separate considerations. Id. Under each of these considerations, the defendant's 30 day time limit is clearly preempted.

First, it is evident that the defendant's time limit conflicts with the time limitations for emergency shelter assistance established by the DHS under state law. The DHS, in administering the AFDC Law, has directed CWAs to provide adequate emergency shelter to homeless families who receive AFDC benefits N.J.A.C. 10:82-5.10(c)(1). Furthermore, in the EA regulation, the DHS established a 60 to 90 day time limitation on emergency shelter assistance for families that are eligible for such assistance. Moreover, under Maticka, the 60 to 90 day time limitation cannot even be employed until the DHS completes proceedings to adopt a revised EA regulation.

Thus, present state law mandates that the DHS and BCWB to provide adequate emergency shelter to homeless families until these families secure permanent housing. As a result of the severe shortage of low income housing in our state, homeless families may remain in need of emergency shelter for extended periods of time. Yet, despite these express state law requirements, defendant seeks to enforce its own local 30 day limit on occupancy by homeless families of any motel room utilized by the BCWB for emergency shelter under the EA program. Thus, the enforcement by defendant of a municipal time limitation stands in direct conflict with the state law, as interpreted in Maticka, that homeless families be provided with "an adequate period for the location of substitute permanent housing for displaced families." Id. at 453.

Second, there can be no doubt that the Legislature expressly intended a state agency, the DHS, to have the exclusive authority to determine the manner in which assistance is provided to needy families with dependent children. As discussed above, the AFDC Law explicitly requires the DHS to issue "all necessary rules and regulations . . . to accomplish the purposes of the AFDC program". N.J.S.A. 44:10-3. Pursuant to this delegated authority, the DHS has determined that homeless families throughout the State should receive emergency shelter and that this type of assistance should be available for periods longer than 30 days.

Third, the matter that the defendant seeks to regulate in this case -- time limits on emergency shelter provided through the EA program -- is clearly an issue that requires uniform treatment on a statewide basis. CWAs must retain the ability to operate under uniform rules regarding the length of time that shelter assistance will be provided to homeless families. These CWAs simply will be unable to perform their duties if they are required to comply with diverse and different time limitations imposed in 567 different municipalities.

Fourth, as alluded to above, the scope of the state scheme for public assistance to needy families with dependent children is "so pervasive and comprehensive" that it clearly precludes municipal regulation in this field. Overlook Ter. Mange. v. Rent Control Bd. of W. New York, supra at 461-62. Indeed, the delegation of authority to the DHS and BCWB under the AFDC Law is so complete that there is not the slightest hint of any legislative intent that municipalities may intrude into the operation of this program through the exercise of any of its powers, zoning or otherwise.

Finally, the defendant's 30 day time limitation clearly stands as an obstacle to the proper fulfillment of the Legislature's objectives for the AFDC program. As plaintiffs' affidavits demonstrate, the goal of providing adequate emergency shelter assistance to homeless families will be totally frustrated if these families are forced to pack-up and move from town to town, from motel to motel, every 30 days on the basis of municipal ordinances. Indeed, enforcement of defendant's time limit will likely result in homeless families remaining homeless for longer periods of time because they will not obtain the type of stable temporary living arrangment that is needed to locate permanent housing, educate children and raise a family in a proper and healthy fashion.

For all of these reasons, there is a strong likelihood that plaintiffs will prevail on their claim that defendant's 30 day time limitation directly conflicts with, and is preempted by, state law requiring shelter assistance to the homeless.

3. Defendant's Time Limitation Constitutes Exclusionary Zoning

Under Article I, paragraph 1 of the New Jersey Constitution, zoning regulations "must not be unreasonable, arbitrary or capricious" and "the means selected must have a real and substantial relation to the object sought to be attained . . . Kirsh Holding Co. v. Borough of Manasquan, 59 N.J. 241, 251 (1971). Furthermore, the zoning power, in order to comport with due process, must be exercised in a manner that benefits the general welfare and, in particular, the housing needs of those residing not only within, but also outside of the community. So. Burlington Cty. NAACP v. Mount Laurel Tp., 92 N.J. 158, 208-09 (1983) ("Mt. Laurel").

Defendant's 30 day time limit on motel occupancy, as applied to plaintiffs and other homeless families, cannot withstand scrutiny under these basic zoning principles. First, the defendant is employing this time limit as a means of removing homeless families from its borders so that the defendant can be relieved from the financial burdens associated with educating plaintiffs' children in local schools. The defendant's time limit, when employed for this purpose, is so unrelated to any legitimate zoning objective that it is clearly arbitrary and unreasonable. Indeed, the Law Division has held that it is impermissible for municipalities to enact zoning ordinances that are intended to limit or restrict the presence of families with school-age children within their borders. In Molino v. Mayor and Council of Bor. of Glassboro, 116 N.J. Super. 195 (Law Div. 1971) the Court invalidated a Glassboro ordinance that restricted the number of bedrooms in apartment complexes within the Borough on the basis that the ordinance constituted impermissible fiscal zoning:

> The added question is the right of Glassboro, by zoning regulations, to restrict its population to adults and the exclusion of children.
>
> The effort to establish a well balanced community does not contemplate the limitation of the number in a family by regulating the type of housing. The attempt to equate the cost of education to the number of children allowed in a project or a community has no relation to zoning. The governmental cost must be an official concern but not to an extent that it determines who shall live in the municipality.
>
> With all our advances in expertise, it is doubtful if the cost for educating children can ever be a profitable undertaking.

Molino, supra at 203-04.

Similarly, by enforcing the 30 day limit against plaintiffs, defendant is attempting, through exclusionary zoning, to expel homeless children from its borders and thereby protect its educational budget from any increased costs. Such zoning is clearly unconstitutional under Molino.

Second, the 30 day time limit, as employed by defendant against plaintiffs, is a blatant effort to prevent homeless families from residing on an emergency basis in Wrightstown. The erection of such a barrier to the placement of homeless families within the community is the very type of exclusionary zoning condemned by the Supreme Court in Mt. Laurel II. Indeed, by banishing homeless families from its borders under the time limit, the defendant is arbitrarily exercising its zoning power in a manner that not only "favor(s) rich over poor", but also imposes "further disadvantages" on the homeless solely on the basis that these persons lack permanent shelter altogether. Id. at 209. In this light, defendant's enforcement effort is "not only a variance with the requirement that the zoning power be used for the general welfare but with all concepts of fundamental powers and decency that underpin many constitutional obligations". Id. at 209-210.*

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* Sheltering the homeless in an adequate manner is a fundamental state policy that rests upon a solid legal foundation. Indeed, in Maticka, Judge Pressler recognized that it is a basic function of government in our State to care for the homeless:

> we start with the self-evident proposition that a civilized society cannot tolerate the homelessness of those of its members who are too impoverished to provide shelter for themselves. We doubt, moreover, that there is any proposition currently affecting the welfare of our citizenry which has received more intense and sympathetic attention from every brance of governmental or which represents a more compelling public policy of this state.

Maticka, supra at 447-448. Defendant's attempt to exclude

(Footnote continues on next page)

Thus, plaintiffs have demonstrated a likelihood of success on their claim that defendant's time limit is arbitrary and unreasonable and constitutes exclusionary zoning in violation of Article I, paragraph 1 of the New Jersey Constitution.

4. Defendant Borough's 30 Day Limit On Occupancy Of Motel Rooms Improperly Discriminates Against Homeless Families and Deprives Homeless Children of Appropriate Educational Opportunities in Violation of the New Jersey and United States Constitutions

The Borough of Wrightstown is enforcing its 30 day limit on occupancy of motel rooms in a manner that improperly discriminates against homeless families and deprives homeless children of appropriate educational opportunities in violation of the New Jersey and United States Constitutions. For this additional reason the plaintiffs have a clear likelihood of success on the merits. This Court shoud, therefore, grant the relief sought and enjoin the defendant from enforcing the ordinance in this manner.

Both the New Jersey and United States Constitutions guarantee to New Jersey citizens equal protection of the law. *

(Footnote continued from previous page)

the homeless from its borders clearly undermines this statewide public policy.

* In the New Jersey Constitution, equal protection is guaranteed under Article I, para. 1. *Robinson v. Cahill*, 62 *N.J.* 473, 482 (1973), subsequent history omitted. The Fourteenth Amendment of the United States Constitution provides:
(Footnote continues on next page)

The public educational requirements for New Jersey children are set forth in the New Jersey statutes. Basically, parents are required to send on a regular basis, and school districts are required to accept free of charge, children between the ages of five and 20 years who are either domiciled within the school district, or whose parent or guardian is residing temporarily in the district. N.J.S.A. 18A:38-1*; N.J.S.A. 18A:38-25, 26; 18A:38-31. **

Plaintiffs' children are clearly entitled to attend the public schools of the district in which they are presently residing with their parents. In fact, plaintiffs are compelled under State law to send their children to this school district as

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(Footnote continued from previous page)

> [n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

* N.J.S.A. 18A:38-1 provides, in pertinent part:

> "Public schools shall be free to the following persons over five and under 20 years of age: (a) Any person who is domiciled within the school district; . . . (b) Any person whose parent or guardian, even though not domiciled within the district, is residing temporarily therein . . . .

** N.J.S.A. 18A:38-25 and 26 require parents to ensure that their children regularly attend the public schools of the district (or a qualified private school) during all the days and hours that the public schools are in session. Failure of a parent to comply subjects the parent to a fine under N.J.S.A. 18A:38-31.

long as Wrightstown constitutes plaintiffs' present residence. The reason for these statutory directives is to effectuate, in part, the requirement under Art. 8, Sec. 4, par. 1 of the New Jersey Constitution that the Legislature "provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all children in the State . . . ." Notably, in the Public School Education Act of 1975, N.J.S.A. 18A:7A-1 et seq., the Legislature declared:

> The goal of a thorough and efficient system of free public schools shall be to provide to all children in New Jersey, regardless of socioeconomic status or geographic location, the educational opportunity which will prepare them to function politically, economically and socially in a democratic society. N.J.S.A. 18A:7A-4 (emphasis added).

Recent federal law also reflects this mandate to provide educational opportunities to children regardless of socioeconomic status or geographic location. On July 22, 1987, the United States Congress enacted the McKinney Homeless Assistance Act, P.L. 100-77. In this Act, Congress specifically addressed the need for appropriate educational opportunities for homeless children, declaring it to be "the policy of the Congress that --

> (1) each State educational agency shall assure that each child of a homeless individual and each homeless youth have access to a free, appropriate public education which would be provided to the children of a resident of a State and is consistent with the State school attendance laws; and

> (2) in any State that has a residency requirement as a component of its compulsory school attendance laws, the State will review and undertake steps to revise such laws to assure that the children of homeless individuals and homeless youth are afforded a free and appropriate public education.

P.L. 100-77, sec. 721.

These legislative goals are plainly defeated by Wrightstown's attempted enforcement of its 30 day limitation on motel occupancy. Children who are forced to transfer to a new school district every 30 days are deprived of the stability and continuity of instruction that, at a minimum, will provide them with an opportunity to learn. Such a policy is without a doubt not an "appropriate" educational opportunity which will prepare them to function in society.

Moreover, since other families with children residing in Wrightstown are not subjected to any similar requirement that after 30 days they must relocate to a new community and transfer their children to another school district, the enforcement of this ordinance with respect to plaintiffs constitutes a violation of equal protection under both the State and federal constitutions. Such a policy would, in effect, "punish" the innocent children of homeless families for their parents' status as homeless persons. It is clear, however, that "visiting . . . condemnation on the head of an infant" for the misfortunes or misdeeds of the parents "is illogical, unjust, and 'contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing".

Plyler v. Doe, 457 U.S. 237, 102 S. Ct. 2382, 2396 (1982), citing Weber v. Aetna Csualty & Surety Co., 406 U.S. 164, 175 (1972).

In Plyler v. Doe, the United States Supreme Court considered the legality of a Texas law that withheld from local school districts state funds for the education of children who were not "legally admitted" into the United States. The Court concluded that the law violated equal protection by denying "a discrete group of innocent children the free public education that it offers to other children residing within its borders." 457 U.S. at 231; 102 S. Ct. at 2401-2402. In reaching this decision, the Court noted the vital importance of a public education and the penalizing impact of denying access to education. 457 U.S. at 221-224, 102 S. Ct. 2396-2398. *

The same analysis applies a fortiori to the present matter. Consequently, an ordinance such as Wrightstown's 30 day residency restriction, as it is being applied in this instance, also violates equal protection of the law under the federal and state constitutions. The ordinance is being applied exclusively to remove the plaintiffs (homeless families with school-age children) from the municipality and thereby exclude plaintiffs' children from the public schools in this school district. The defendant Borough is thereby disrupting and damaging the

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* The Court applied a test of heightened scrutiny and concluded that the State of Texas failed to show that the classification furthered "a substantial state interest." 457 U.S. at 221-225, 231, 102 S. Ct. at 2396-2398, 2401-2402.

education of these homeless children, with possibly lasting negative impacts, in direct contravention of state and federal legislative policy. No legitimate purpose is served by the defendant's action in this regard.* Therefore, since the Borough cannot show that the enforcement of this ordinance furthers a substantial governmental interest, the ordinance is invalid to the extent it is applied to deprive innocent children of the same educational opportunity that other children residing in Wrightstown are provided.

Finally, the relative hardships to the parties and the public interest favor the grant of temporary restraints. On the one hand, the state's duty to provide adequate emergency shelter to homeless families will be vindicated and the homeless will be afforded an opportunity to receive such shelter without unreasonable disruption if relief is granted. On the other hand, the municipalities will not be harmed, pending final disposition of this matter, by permitting plaintiffs to remain in their emergency shelter. Indeed, as the Law Division commented in a recent decision that blocked a municipality from closing a shelter for the homeless, any inconvenience to the defendant and its residents "pales into insignificance" when contrasted with what plaintiffs would face if they are removed under defendant's ordinance. St. John's Evangelical Lutheran Church v. Hoboken, 195 N.J. Super. 414, 421 (Law Div. 1983).

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* The enforcement of this ordinance has been directed solely at families whose children are enrolled in defendant's schools. The Borough, therefore, appears to be motivated by fiscal considerations. However, as noted above, the Law Division, in striking down a zoning ordinance designed to limit the number of children in a municipality, stated that "the governmental cost [of education] must be an official concern but not to an extent that it determines who shall live in the municipality." Molino, supra, 116 N.J. Super. at 203. Fiscal considerations were similarly rejected as an appropriate State interest in Plyler. 457 U.S. at 228-231, 102 S. Ct. at 2400-2401.

CONCLUSION

For the reasons set forth above, plaintiffs submit that they have fully satisfied the requirements for the issuance of a preliminary injunction. Accordingly, plaintiffs request that this Court immediately restrain the defendant Borough from taking any action under Section 14-6.5b.4 of its zoning code to remove plaintiffs and other homeless families from their emergency shelter.

Respectfully submitted,

ALFRED A. SLOCUM
PUBLIC ADVOCATE OF NEW JERSEY

By: ________________________
David G. Sciarra
Assistant Deputy Public Advocate

Susan R. Oxford
Susan R. Oxford
Assistant Deputy Public Advocate

Filed Sept 27, 1987

Harold B. Wells

HAROLD B. WELLS, III, J.S.C.

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
DOCKET NO. C-7545-87

GLORIA VINGARA, RUTH BARGER, HELEN WALKER, KAREN BULLUCK and ALFRED A. SLOCUM, PUBLIC ADVOCATE OF NEW JERSEY

Plaintiffs,

v.

BOROUGH OF WRIGHTSTOWN,

Defendant.

Civil Action

COMPLAINT

I. INTRODUCTORY STATEMENT

1. This is an action for declaratory and injunctive relief brought by homeless families who reside in the McGuire/Holiday Motel located in the Borough of Wrightstown, Burlington County, and by Alfred A. Slocum, the Public Advocate of New Jersey.

2. The plaintiff families in this action are all homeless and recipients of Aid To Families With Dependent Children (AFDC). As a result of their homelessness, plaintiff families became eligible for emergency assistance (EA) from the Burlington County Welfare Board (hereinafter BCWB). Plaintiff families were thereafter provided with emergency shelter at the McGuire/Holiday Motel in Wrightstown.

3. On or about September 15, 1987, plaintiff families were ordered to vacate their rooms at the McGuire/Holiday Motel by October 1, 1987 pursuant to a provision of the zoning ordinance of the defendant Borough of Wrightstown. This zoning provision limits occupancy of a motel room to no longer than 30 days.

4. Defendant is seeking to compel plaintiffs and other homeless families to leave Wrightstown through enforcement of the 30 day limit on motel occupancy in order to prevent plaintiffs' children and other homeless children from attending public school in the school system that serves residents of Wrightstown.

5. Plaintiffs contend that defendant's practice and policy of enforcing the 30 day limitation on motel occupancy is unlawful on several grounds, including but not limited to the following: (1) defendant's actions conflict with, and are preempted by the statewide requirements of the Aid to Families With Dependent Children (AFDC) Law, N.J.S.A. 44:10-1 et seq., and the state emergency assistance (EA) regulation, N.J.A.C. 10:82-5.10; (2) defendant's actions constitute an exclusionary zoning device designed to banish homeless families from Wrightstown in contravention of the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq., and Article I, paragraph 1 of the New Jersey Constitution; and (3) defendant's action discriminates against homeless children by depriving these children of appropriate educational benefits in violation of the equal protection clause of the New Jersey and United States Constitutions.

6. Specifically, plaintiffs in the present action seek a temporary and permanent injunction prohibiting the defendant from enforcing the 30 day limitation on motel occupancy against plaintiffs and other homeless families or from engaging in any other actions to remove the plaintiffs from Wrightstown. Additionally, plaintiffs seek a declaration that the 30 day limitation in defendant's zoning ordinance violates State and federal law and is, therefore, invalid as applied to homeless families who are provided emergency shelter under the AFDC statutes and the emergency shelter regulation. Plaintiffs further seek a declaration that the motel time limitation is arbitrary unreasonable and constitutes illegal exclusionary zoning under the Municipal Land Use Law, N.J.S.A. 40:550-1 *et seq.*, Article I, paragraph 1 of the New Jersey Constitution, and the 14th Amendement of the United States Constitution. Finally, plaintiffs seek a declaration that defendant's actions to enforce the 30 day time limit discriminates against homeless children in the provision of educational opportunities in violation of the equal protection clause of the New Jersey and United States Constitutions.

II. PARTIES

7. Plaintiff, Gloria Vingara, is homeless and indigent. Ms. Vingara presently resides with her children in rooms 28 and 30 at the McGuire/Holiday Motel in Wrightstown. Ms. Vingara's only income is an AFDC grant of $554.00 per month and $231.00 in

food stamps from the BCWB. Because Ms. Vingara is homeless, she is eligible for emergency shelter assistance, or EA, from the BCWB and was provided with emergency housing at the McGuire/Holiday Motel on July 6, 1987.

8. Ms. Vingara is the mother of five children: John, age 16; Lester, age 15; Tammy, age 13; Crystal, age 10; and Joseph, age 4 1/2.

9. Plaintiff, Karen Bulluck, is homeless and indigent. Ms. Bulluck resides with her daughter in room 84 at the McGuire/Holiday Motel in Wrightstown. Ms. Bulluck's only income is an AFDC grant of $437.00 per month and $212.00 in food stamps from the BCWB. Because Ms. Bulluck is homeless, she is eligible for emergency shelter assistance or EA, from the BCWB and was provided with emergency housing in the McGuire/Holiday Motel on July 3, 1987.

10. Ms. Bulluck is the mother of four children, Neisha, age 6; Donald, age 3 1/2; Jasmine, age 2 1/2; and Eric, age 1 1/2.

11. Plaintiff, Ruth Barger, is homeless and indigent. Ms. Barger presently resides with her children in room 34 at the McGuire/Holiday Motel in Wrightstown. Ms. Barger's only income is an AFDC grant of $552.00 per month and $196.00 in food stamps from the defendant BCWB. Because Ms. Barger is homeless, she is eligible for emergency shelter assistance, or EA, from the defendant BCWB and was provided with emergency housing at the McGuire/Holiday Motel in the latter part of May 1987.

12. Ms. Barger has four children: Diana, age 12; John, age 9; Robert, age 6 and William, age 2 months. At present, Diana, Robert and William reside with Ms. Barger and John lives with Ms. Barger's mother in Browns Mills, New Jersey.

13. Plaintiff, Helen Walker, is homeless and indigent. Ms. Walker presently resides with her children in room 71 at the McGuire/ Holiday Motel in Wrightstown. Ms. Walker's only income consists of an AFDC grant of $528.00 per month and $183.00 in food stamps from the defendant BCWB. Because Ms. Walker is homeless, she is eligible for emergency shelter assistance, or EA, from the defendant BCWB and was provided with emergency housing in McGuire/Holiday Motel by the defendant Welfare Board on July 29, 1987.

14. Ms. Walker is the mother of four children who reside with her: Nicole, age 13; Markia, age 10; Omar, age 3; and Tyavian, age 1 1/2.

15. Plaintiff Alfred A. Slocum is the Public Advocate of the State of New Jersey, and will hereinafter be referred to as the Public Advocate. As the Public Advocate, Alfred A. Slocum is charged by law with representing the public interest, which is defined, _inter alia_, as an interest or right arising under the Constitution or laws of New Jersey which inheres in citizens of this State or a broad class of such citizens. _N.J.S.A_. 52:27E-30 and 31.

16. The Public Advocate brings this action on behalf of all homeless families who reside on an emergency basis in motel

rooms in defendant Borough of Wrightstown. In this action, the Public Advocate seeks to establish that the defendant's zoning ordinance, insofar as it limits residence in a motel to 30 days, directly conflicts with the requirements of AFDC Law, N.J.S.A. 44:10-1 *et seq*. and the emergency assistance regulation, N.J.A.C. 10:82-5.10; constitutes exclusionary zoning in violation of the Municipal Land Use Law, N.J.S.A. 40:55d-1 *et seq*. and Article I, paragraph 1 of the New Jersey Constitution; and, by depriving homeless children of educational opportunities, discriminates against these children under federal and State statutes and the New Jersey and United States Constitutions. The Public Advocate, through the Division of Public Interest Advocacy, has standing to represent the rights and interests of homeless families in any court proceeding that the Public Advocate "deems shall best serve the public interest." N.J.S.A. 52:27E-29.

17. The defendant, Borough of Wrightstown, is a municipality in the County of Burlington organized under the laws of the State of New Jersey.

III. FACTS

18. The plaintiff families identified in paragraph 8-17 are homeless and a recipients of AFDC from the BCWB.

19. Each of the plaintiff families, on different occasions, became homeless and applied for emergency assistance (EA) under N.J.A.C. 10:82-5.10 from the BCWB.

20. Each of the plaintiff families' application for emergency assistance was granted by the BCWB.

21. On separate occasions, between May and August 1987, plaintiff families were provided emergency shelter by the BCWB in rooms at the McGuire/Holiday Motel in Wrightstown.

22. Each of the plaintiffs has one or more children of school age in their families.

23. At various times beginning in early September, 1987, plaintiffs registered and enrolled their school-age children at the New Hanover Township Elementary School in New Hanover Township (hereinafter referred to as "New Hanover Elementary School"). The New Hanover Elementary School provides education for all children who reside within the Borough of Wrightstown.

24. At various times beginning September 9, 1987, plaintiffs' children began attending school at the New Hanover Elementary School.

25. On or about September 11, 1987, the plaintiffs were notified by the BCWB and the owner of the McGuire/Holiday Motel that the defendant had directed the BCWB and the motel owner to remove the plaintiffs from their motel rooms and relocate them out of Wrightstown altogether. Plaintiffs were also notified that they were in violation of the defendent's zoning ordinance which limits occupancy in motels to 30 days.

26. Plaintiffs were further notified by the BCWB and the owner of the McGuire/Holiday Motel that the defendant has issued the directive that plaintiffs be removed from Wrightstown

because plaintiffs' children are attending the New Hanover Elementary School.

27. At a meeting of elected officials of the defendant Borough of Wrightstown on September 15, 1987, plaintiffs were directly instructed by these officials that they were in violation of the 30 day limit in the zoning ordinance and that they had to leave Wrightstown. Plaintiffs were further advised that the attendance of their children in the New Hanover Elementary School had placed a financial burden on the defendant borough and that the plaintiffs children could no longer be educated at the expense of the taxpayers of Wrightstown. Defendant Borough of Wrightstown's officials directly advised plaintiffs that they had to move from Wrightstown by October.

28. Defendant Borough is presently seeking to remove plaintiffs from their emergency housing at the McGuire/Holiday Motel through enforcement of Section 14-6.5b.4 of the defendant's zoning ordinance. Section 14-6.5b.4 imposes a 30 day limitation on occupancy of all motel rooms in Wrightstown.

29. Defendant Borough is seeking to remove plaintiffs and their families from the McGuire/Holiday Motel solely because plaintiffs are homeless and because plaintiffs' children are attending school at the New Hanover Elementary School.

30. Defendant's efforts to remove plaintiffs from the McGuire/Holiday Motel will cause serious harm to the health and well-being of plaintiffs and their children. If forced to relocate from Wrightstown, plaintiffs' children will have to stop

attending the New Hanover Elementary School where they have been attending school since the start of the school year. Plaintiffs' children will then be forced to transfer into a completely different school district in another community.

31. Defendants' actions, if not enjoined, will inevitably lead to efforts on the part of other municipalities to pursue similar actions to banish homeless families from their municipal borders. At the present time, at least one other municipality in Burlington County is enforcing an identical ordinance to expel the homeless. As a result of such municipal actions, homeless families will be repeatedly required to leave emergency shelter facilities in each municipality. Thus, the children of these homeless families will be forced to leave their present school and enter a new school every thirty days.

32. By removing plaintiffs from Wrightstown under the zoning ordinance, defendant is causing the disruption of the education of plaintiffs'school age children and causing plaintiffs and their children severe developmental, emotional and psychological harms.

IV. Claims For Relief

First Count: Defendant's Time Limitation Is Preempted By The State's Duty To Provide Shelter To The Homeless

33. Plaintiffs repeat and incorporate paragraph 1 through 33 as if set forth fully herein.

34. Under the Aid To Families With Dependent Children Law, N.J.S.A. 44:10-1 *et seq*., the emergency assistance (EA) regulation, N.J.A.C. 10:82-5.10, and our state's public policy towards the homeless, the New Jersey Department of Human Services (DHS) and the BCWB have the exclusive duty to provide adequate emergency shelter to the homeless and needy families.

35. This exclusive duty to provide adequate emergency shelter under the AFDC Law, the EA regulation and public policy includes (a) providing emergency shelter to homeless families for a period longer than 30 days, and (b) providing homeless children with the opportunity to receive an appropriate education.

36. The defendant's policy and practice of removing plaintiff and other homeless families from emergency shelter under the 30 day limitation in occupancy of motel rooms directly conflicts with, and is preempted by the DHS' and BCWB's exclusive duty to provide adequate emergency shelter under the AFDC Law, N.J.S.A. 44:10-1 *et seq*., the emergency assistance

regulation, *N.J.A.C.* 10:82-5.10, and the state's public policy towards the homeless.

Second Count: Defendant's 30 Day Limit Constitutes Exclusionary Zoning

37. Plaintiffs repeat and incorporate paragraphs 1 through 37 as if fully set forth herein.

38. Section 14-6.5 b.4 of the defendant's zoning ordinance provides for a 30 day maximum limitation on occupancy of motel rooms in Wrightstown.

39. Defendant is enforcing the 30 day limitation on motel occupancy against plaintiffs and other homeless families as a means of prohibiting plaintiffs' children and other homeless children from attending the New Hanover Elementary School and as a means of preventing plaintiffs and other homeless families from obtaining adequate emergency shelter in Wrightstown.

40. Defendant's practice and policy of enforcing the 30 day limitation on occupancy of motel rooms is arbitrary, unreasonable and unrelated to any legitimate zoning objective, in violation of the Municipal Land Use Law, *N.J.S.A.* 40:55d-1 *et seq.*, and Article I, paragraph 1 of the New Jersey Constitution and the Fourteenth Amendment of the United States Constitution.

41. Defendant's practice and policy of enforcing the 30 day limitation on occupancy of motel rooms against plaintiffs and other homeless families constitutes zoning that is designed to

exclude homeless families with children from residing in the defendant Borough in direct violation of Article I, paragraph 1 of the New Jersey Constitution.

Third Count: Defendant's 30 Day Limit Improperly Discriminates Against Homeless Families

43. Plaintiffs repeat paragraphs 1 through 42 as if fully set forth herein.

44. Section 14-6.5b4 of defendant's zoning ordinance provides for a 30 day maximum on occupancy of motel rooms in Wrightstown.

45. Defendant is enforcing the 30 day limitation on motel occupancy against plaintiffs and other homeless families as a means of prohibiting plaintiffs' children and other homeless children from attending the New Hanover Elementary School and as a means of preventing plaintiffs and other homeless families from obtaining adequate emergency shelter in Wrightstown.

46. Defendant's practice and policy of enforcing the 30 day limitation on motel occupancy discriminates against plaintiffs' children and other homeless children by depriving these children of the educational benefits and opportunities that are available to all other children who reside in Wrightstown.

47. Defendant's practice and policy of enforcing the 30 day time limitation deprives plaintiffs' children and other homeless children of appropriate educational opportunities in violation of the equal protection clause of Article I, paragraph

1 of the New Jersey Constitution and the 14th Amendment of the United States Constitution.

V. Relief Sought

Wherefore, plaintiffs demand judgment against defendant for the following relief:

A. Enter A Declaratory Judgment that:

1. Defendant's action to enforce against plaintiffs and other homeless families the 30 day limitation on motel occupancy in defendant's zoning ordinance is preempted by the AFDC Law, N.J.S.A. 44:10-1 et seq., the emergency assistance regulation, N.J.A.C. 10:82-5.10, the State's public policy towards the homeless.

2. Defendant's action to enforce against plaintiffs and other homeless families the 30 day limitation on motel occupancy is arbitrary, unreasonable and unrelated to any permissible zoning objective in violation of Article I, paragraph 1 of the New Jersey Constitution, the 14th Amendment of the United States Constitution, and the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq., and constitutes exclusionary zoning in violation of Article I, paragraph 1 of the New Jersey Constitution.

3. Defendant's action of enforcing the 30 day limitation on motel occupancy discriminates against plaintiffs' children and other homeless children is depriving these children

of appropriate educational benefits and opportunities in violation of the equal protection clause of Article I, paragraph 1 of the New Jersey Constitution and the 14th Amendment of the United States Constitution.

B. Enter temporary restraints and a Preliminary injunction restraining defendant from enforcement of the 30 day limitation on motel occupancy as to plaintiffs and any other homeless family residing in motels within Wrightstown.

C. Enter a Permanent injunction restraining defendant from enforcement of the 30 day limitation on motel occupancy as to plaintiffs and any other homeless family residing in motels in Wrightstown.

D. Such other relief as the Court deems just, equitable and appropriate.

ALFRED A. SLOCUM
Public Advocate of New Jersey

BY David G. Sciarra
DAVID G. SCIARRA
Assistant Deputy Public Advocate

DATED: September 29, 1987

III. CASES AND PLEADINGS

A. Decided Cases

5. Tynan v. Wooley

No. 12010

The University of the State of New York

The State Education Department

Before the Commissioner

Appeal of PATTI TYNAN, on behalf of her children, STEVEN and STEPHANIE, from action of Richard Wooley, Superintendent of Schools of the Spackenkill Union Free School District regarding admission to school.

Westchester Legal Services, Inc., attorneys for petitioner, John T. Hard, Esq., of counsel

Plunkett & Jaffe, P.C., attorneys for respondent, John M. Donoghue, Esq., of counsel

Petitioner appeals from respondent's determination that she is not a resident of the Spackenkill Union Free School District and its refusal to admit her children to the public schools of that district. The appeal must be sustained.

In May, 1986, petitioner moved to New York State from Oregon. Petitioner applied for and received public assistance from the Department of Social Services, Westchester County, which provided housing for petitioner and her children at the Valley Motel in Pleasant Valley. The motel is the Arlington Central School District, and her children attended school in Arlington during the 1986-87 school year.

On April 22, 1987, petitioner left the Valley Motel at the request of the management, and moved to the Best Western Red Bull Inn in Poughkeepsie, which is located within the Spackenkill Union Free School District. She and her children have stayed there at the expense of the Department of Social Services. Petitioner has tried to obtain permanent housing in that area, but has not as yet been able to locate affordable housing.

After petitioner moved from the Valley Motel in the Arlington Central School District, she was advised by employees of that district that her children could no longer attend its schools because she had ceased to be a resident of that district. She then contacted the Spackenkill school district and tried to enroll her children in its schools. Petitioner was advised that her children could not be enrolled in Spackenkill because she lacked a permanent residence in the district. Petitioner then wrote to respondent on August 7, 1987, and called his office a week later and again on August 14. She was referred to the school district's attorney. After considering the matter, the school attorney on August 31 notified petitioner's representative that it was respondent's position that petitioner's children should attend school in the Arlington Central School District.

Petitioner then brought this appeal, and on September 22, 1987, I issued an interim order pursuant to which petitioner's children were enrolled in the public schools of the Spackenkill Union Free School District pending a determination on the merits of the appeal.

Petitioner alleges that she is a resident of the Spackenkill school district and that she does not intend to return to live in the Arlington school district. She further alleges that she is seeking housing in the Poughkeepsie area, within the Spackenkill school district. Moreover, she asserts that her family maintains no community contacts at all in the Arlington district and that Spackenkill is her district of residence.

Respondent argues that petitioner's only ties are with the Arlington school district, based on the fact that her children attended school in that district during the entire 1987-88 school year and that she is only temporarily in Spackenkill.

Education Law §3202(1) provides in part:

> A person over five and under twenty-one years of age who has not received a high school diploma is entitled to attend the public schools maintained in the district in which such person resides without the payment of tuition.

The issue to be decided then is whether, under the circumstances presented, petitioner's residence for the purposes of §3202 is the Spackenkill school district.

Residency is established through both intent and action expressing that intent (Matter of Woodward, 27 Ed Dept Rep ___, Decision No. 12003, dated June 20, 1988; Matter of Richards, 25 id. 38). I conclude, from the particular facts of the record before me, that when petitioner left the motel in Pleasant Valley and relocated to the motel in Poughkeepsie, she acquired a residence in Spackenkill and lost her previous residence in the Arlington school district. Petitioner had no relatives or other community ties in the Arlington district, and was in that district solely because that is where the officials of the Department of Social Services placed her. She has expressed her intent to remain in Spackenkill, her current location and to seek permanent housing there. There is no evidence in the record before me to refute petitioner's assertion that she intends to remain in Spackenkill, or to establish that she has community ties in any other school district.

Respondent's reliance upon my decision in Matter of Richards, 25 Ed Dept Rep 38, to support his contention that petitioner continues to reside in the Arlington school district, is misplaced. In Richards, the petitioner had previously lived in a school district but was forced to temporarily relocate. However, the petitioner's stated intent was to locate a place to stay and return to the school district where she had established strong community ties. In this appeal, petitioner has maintained no such ties with the Arlington school district and she clearly expresses an intent to reside in the community where she is now located. Petitioner has resided at the Red Bull Inn since April, 1987 and she has no residence other than in respondent's district (see Matter of Delgado v. Freeport Public School District, 131 Misc 2d 102). Therefore, I conclude that petitioner's current and sole residence is at the Red Bull Inn, located in the Spackenkill school district, and that her children are entitled to attend the public schools there without the payment of tuition.

Although not directly applicable to this appeal, it should be noted that the Board of Regents has recently approved new provisions of section 100.2 of the Regulations of the Commissioner of Education which will become effective on July 8, 1988, and should alleviate some of the problems faced by parents and boards of education, in situations such as petitioner's. These should assure that children of homeless families receive adequate educational services by setting forth a procedure for making determinations of the school district a homeless child should attend.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that respondent recognize petitioner as a resident of the district and admit her children to its schools.

IN WITNESS WHEREOF, I, Thomas Sobol, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 1st day of July, 1988.

Thomas Sobol

Commissioner of Education

NEW YORK STATE DEPARTMENT OF EDUCATION
ALBANY, NEW YORK
****
PATTI TYNAN, on behalf of herself
and her minor children, STEVEN and
STEPHANIE TYNAN,

Petitioner,

NOTICE OF PETITION AND NOTICE OF APPLICATION FOR STAY

-against-

RICHARD WOOLEY, Superintendent
of Schools of the Spackenkill
Union Free School District,

Respondent.

****

NOTICE:

You are hereby required to appear in this appeal and to answer the allegations contained in the petition. Your answer must conform with the provisions of the regulations of the Commissioner of Education relating to appeals before the Commissioner, copies of which are available from the office of Counsel, New York State Education Department, State Education Building, Albany, New York 12234.

If an answer is not served and filed in accordance with the provisions of such rules, the statements contained in the petition will be deemed to be true statements, and a decision will be rendered thereon by the Commissioner.

Please take notice that such rules require that an answer to the petition must be served upon the petitioner, or if she be represented by counsel, upon her counsel, within twenty (20) days after the service of the appeal, and that a copy of such answer must, within five (5) days after such service, be filed with the Office of Counsel, New York State Education Department, State Education Building, Albany, New York 12234.

Please take further notice that the within petition contains an application for a stay order. Affidavits in opposition to the application for a stay must be served on all other parties and filed with the Office of Counsel within three business days after service of the petition.

Dated: Yonkers, New York
September 3, 1987

WESTCHESTER LEGAL SERVICES, INC.
by: John T. Hand, of counsel
Jerrold M. Levy, of counsel
201 Palisade Avenue
P.O. Box 246
Yonkers, New York 10703
Tel: (914) 423-0700
Attorneys for Petitioners

NEW YORK STATE DEPARTMENT OF EDUCATION
ALBANY, NEW YORK
****

PATTI TYNAN, on behalf of herself and
her minor children, STEVEN and
STEPHANIE TYNAN,

Petitioner,

-against-

RICHARD WOOLEY, Superintendent of
Schools of the Spackenkill Union Free
School District,

Respondent.

VERIFIED PETITION

Oral Argument
is Requested

****

TO: THE STATE COMMISSIONER OF EDUCATION
STATE OF NEW YORK

The petitioner PATTI TYNAN on behalf of herself and her minor children, STEVEN and STEPHANIE TYNAN, respectfully alleges that:

PRELIMINARY STATEMENT

1. This is a proceeding brought pursuant to Article 7 of the New York State Education Law and 8 NYCRR Parts 275 and 276 by petitioner Patti Tynan on behalf of her children Steven and Stephanie, contesting the exclusion by respondent of her children from attendance at the schools within respondent's school district.

PARTIES

2. Petitioner and her children, Steven, age 8 and Stephanie, age 6 reside at The Best Western Red Bull Inn, 576 South Road, Route 9, Poughkeepsie, New York. Petitioner has sole custody of said children.

3. Respondent Richard Wooley is Superintendent of Schools of the Spackenkill Union Free School District. Respondent Wooley maintains an office at 42 Hagan Drive, Poughkeepsie, New York.

FACTS

4. Prior to May, 1986, petitioner and her family lived in the State of Oregon. Due to the lack of job opportunities in the area, petitioner decided to leave Oregon and try to make a better life for herself and family in New York State.

5. In May, 1986, petitioner's family left Oregon and arrived in the Bronx, with the intent to live in New York State permanently.

6. Upon the arrival of petitioner's family in the Bronx, petitioner was told by her aunt, who lives there, that petitioner's family could not stay at the aunt's apartment. Petitioner at that time had no place to stay.

7. Petitioner sought help from a policeman, who assisted her in obtaining a hotel room on an emergency basis in Yonkers, New York.

8. Upon petitioner's application for public assistance, the Yonkers office of the Department of Social Services of Westchester County gave to petitioner's family public assistance to stay in a motel in Yonkers, and then, on or about May 12, 1986, the family was given public assistance to stay at the Valley Motel in Pleasant Valley, New York.

9. In September, 1986, petitioner enrolled her children, Steven and Stephanie Tynan in school at the Traver Road Elementary School in Pleasant Valley. Steven entered and completed the second grade and Stephanie entered and completed kindergarten.

10. Petitioner's family was abruptly required to leave the Valley Motel on or about April 22, 1987 at the insistence of the motel's management, due to events over which petitioner had no control.

11. After a one-night stay at the Coachman Hotel in White Plains, New York, on or about April 23, 1987, petitioner and her family moved to the Best Western Red Bull Inn, located at 576 South Road, Poughkeepsie, New York, where petitioner and said children have remained continuously since that time.

12. Petitioner and her family are dependent upon public assistance for their subsistence and in order to remain at the Red Bull Inn.

13. Petitioner and her family have no home or abode anywhere other than the Red Bull Inn.

14. It remains petitioner's intention to live in New York State permanently.

15. It is petitioner's intention to remain in the Red Bull Inn until she is able to locate a suitable, affordable apartment or house. Petitioner is seeking housing in the vicinity of the Inn, particularly in the Poughkeepsie area.

16. Petitioner is also residing with two other children and Lynn Smith, who petitioner regards as her common-law husband and who is the father of her youngest child. Mr. Smith is seeking work in the Poughkeepsie area. Petitioner and Mr. Smith have no property except for their personal effects, a 1974 AMC vehicle which is registered to Mr. Smith in New York State and a joint savings account at the Poughkeepsie Savings Bank, with a balance under $10.00.

17. Petitioner and her family have no choice but to reside in a motel or hotel because the family is unable to locate and secure other public or private housing accommodations which the family can afford.

18. Petitioner is signed up with the federally subsidized "section 8" program, administered in Poughkeepsie, but she has been told that there is a waiting list for applicants for such housing of a year or more.

19. Upon information and belief, there is a critical shortage of housing for lower income people, resulting in many hundreds of families having to reside for many months and even years in motels and hotels in the lower Hudson

20. Petitioner has been advised by the Arlington School District, where Steven and Stephanie attended school during the 1986-1987 school year, that the children cannot continue in that district because the family is no longer residing within that district.

21. Petitioner contacted respondent's school district by telephone on or about August 5, 1987, in order to arrange for the enrollment of her children in an elementary school in the district in which she is now residing, viz, the Spackenkill School District.

22. Petitioner spoke with a Ms. Pendleton of respondent's office who indicated to petitioner that it seemed that petitioner's children could not attend school in the district because she was residing in a motel and did not have a permanent address.

23. Petitioner wrote a letter dated August 7, 1987 to respondent explaining her circumstances and that she wanted her two school-age children to go to school. In her letter, petitioner informed respondent that "it is our intention to live in New York permanently" and that "we have no home besides our place in the motel." A copy of a handwritten copy of said letter is annexed hereto, marked exhibit "A".

24. Having received no response, oral or written to said letter, on or about August 13, 1987, petitioner called respondent's office to speak with him, but reached someone else who informed petitioner that respondent had received the

letter but not had a chance to read it. Petitioner requested a response to her letter and was told that someone would call her.

25. Having heard nothing from respondent, on or about August 14th, petitioner again called respondent's office. This time petitioner was told that respondent had read the letter and that petitioner should contact the attorney for the school district. Petitioner called the person whose name was given to her, a Mr. Donahue, who told her he did not know anything about the matter, but that he would find out and someone would call back.

26. Having heard nothing further from respondent or his attorney, on or about August 20th, petitioner called respondent's office; she was advised by someone in respondent's office that the children could not be admitted to school based on advice of the school district's attorney and due to the fact that "social services is paying the motel bill."

27. Petitioner's attorney advises her that respondent's attorney informed him on or about August 31, 1987, that it is respondent's position that petitioner's children should attend school in the Arlington School District.

28. At no time has petitioner received any written notice from respondent of his refusal to admit Steven and Stephanie to school, of the factual and legal basis of respondent's determination and of the procedures for appeal

thereof.

29. Petitioner's family is indigent and is unable to establish any home other than the Red Bull Inn at the present time. The eligibility requirement of respondent that petitioner live somewhere other than a motel creates a bar to the education of her children which petitioner does not have the ability to remove. Such total denial of education of the petitioner's children will cause devastating and permanent injuries to petitioner's children and to petitioner.

LEGAL CLAIMS

30. Article 11 Section 1 of the Constitution of New York State states that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."

31. Section 3202(1) of the New York Education Law, states that "[a] person over five and under twenty-one years of age who has not received a high school diploma is entitled to attend the public schools maintained in the district in which such person resides without the payment of tuition...."

32. Section 3205 (1)(a) of the New York Education Law states that "[i]n each school district of the state, each minor from six to sixteen shall attend upon full time instruction."

33. Petitioner is a tenant of said Red Bull Inn within the meaning of the word "tenant" in Real Property Actions and

Proceedings Law §711.

34. Petitioner and said children are citizens of the United States and of the State of New York.

35. Petitioner and said children are residents of the State of New York and of no other state of the United States.

36. Petitioner and said children are residents of respondent's school district within the meaning of New York Education Law §3202(1).

37. Petitioner's said children are entitled to be educated in the public schools in respondent's school district without the payment of tuition.

38. Respondent's refusal to admit petitioner's children to the schools of respondent's school district violates the rights of petitioner and her children under New York Education Law §§3202, 3205, 3210, 3211, 3212 and under Article 11 Section I of the New York State Constitution.

39. Respondent's refusal to admit petitioner's children to the schools of respondent's school district violates the rights of petitioner and her children under the due process and equal protection clauses of Article 6, Sections 6 and 11 of the New York State Constitution and the 14th Amendment of the United States Constitution.

40. Respondent's refusal to admit petitioner's children to the schools of respondent's school district is arbitrary, capricious and unreasonable.

41. Upon information and belief, under United States

Public Law 100-77, known as the McKinney Homeless Assistance Act, signed into law on July 22, 1987, the State of New York has or will have a duty to ensure that petitioner's children are appropriately educated, similarly to children who are not homeless.

42. Petitioner's said children are residing in an inn rather than in an ordinary apartment or house due to the indigency of petitioner, the lack of housing accommodations for low income families and due to peculiarities of federal and state housing and welfare assistance rules.
Petitioner's children must not be penalized and denied an appropriate education because they are not living in an apartment or a house. Rather, the State of New York must provide an equal educational opportunity to petitioner's children while they remain in an inn while receiving public assistance.

43. Under Article 7 of the New York Education Law and under the statutes and constitutional provisions mentioned hereinabove, the Commissioner of Education has the duty to ensure that all the children of the State of New York are provided with appropriate education, including petitioner's children.

APPLICATION FOR TEMPORARY RELIEF

44. As appears from the foregoing facts and circumstances, the refusal of respondent to admit petitioner's children to the schools of respondent's school district threatens imminently to cause grave and irreparable injury to petitioner and her children, Steven and Stephanie Tynan. A temporary order is necessary to protect the interests of petitioner and her children during the pendency of the appeal. The schools in respondent's district open September 8, 1987.

WHEREFORE, petitioner respectfully requests the following relief:

a) The refusal of respondent to admit petitioner's children Steven and Stephanie Tynan to the Spackenkill schools should be annulled and reversed, and respondent should be directed forthwith to admit petitioner's children to school in respondent's school district without the payment of tuition;

b) Petitioner requests that respondent be directed immediately to admit petitioner's said children to the appropriate elementary school in respondent's school district, as of September 8, 1987, and to continue to provide education to petitioner's children pending the disposition of this appeal;

c) Petitioner requests such other and further relief as to the Commissioner of Education seems just and proper;

d) Petitioner requests permission to present oral argument on this matter before the Commissioner of Education.

Dated: Yonkers, New York
September 3, 1987

WESTCHESTER LEGAL SERVICES, INC.
John T. Hand, of counsel
Jerrold M. Levy, of counsel
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Attorneys for Petitioner

No. INTERIM ORDER

The University of the State of New York

The State Education Department

Before the Commissioner

Appeal of PATTI TYNAN, on behalf of her
children, STEVEN and STEPHANIE, from action
of Richard Wooley, Superintendent of Schools
of the Spackenkill Union Free School District
regarding residency.

Westchester Legal Services, Inc., attorneys for petitioner, John T. Hard, Esq., of counsel

Plunkett & Jaffe, P.C., attorneys for respondent, John M. Donoghue, Esq., of counsel

Petitioner appeals from respondent's determination that she is not a resident of the Spackenkill Union Free School District and refusal to admit her children to the public schools of that district. She asks that I issue an order directing respondent to admit her children to school in the Spackenkill school district pending a determination on the merits of the appeal.

In May, 1986, petitioner moved to New York State from Oregon. Petitioner applied for and received public assistance from the Department of Social Services, Westchester County, which provided housing for petitioner and her children at the Valley Motel in Pleasant Valley. The motel is located within the Arlington Central School District, and in September, 1986, petitioner enrolled her children in the schools of that district. Petitioner's children attended school in the Arlington district for the 1986-87 school year.

On April 22, 1987, petitioner left the Valley Motel at the request of the management, and moved to the Best Western Red Bull Inn in Poughkeepsie, which is located within the Spackenkill Union Free School District. She and her children have resided there on public assistance continuously since April.

Petitioner was advised by the Arlington Central School District that her children could not attend school in that district during the 1987-88 school year because she was no longer a resident of that district. Therefore, in August, 1987, petitioner contacted the offices of the Spackenkill school district to enroll her children in public schools. On August 20, petitioner called the district offices, and was advised by an individual in respondent's office that her children could not be enrolled in school in the Spackenkill school district, because she did not have a permanent residence in the district.

On August 31, 1987, respondent's attorney notified petitioner's attorney that respondent had determined that petitioner's children should attend school in the Arlington Central School District, and this appeal ensued.

The record thus far indicates that petitioner is attempting to seek housing in the Poughkeepsie area, but has been unsuccessful to date. She has also been unable to secure employment and continues to receive public assistance. Petitioner's children are not presently attending school.

Respondent argues that petitioner's only ties are with the Arlington school district, based on the fact that her children attended school in that district during the 1987-88 school year. It is clear however, that petitioner no longer resides in that district, but that her current and sole residence is at the Red Bull Inn, which is located in the respondent's school district. Respondent's argument that petitioner's situation may change in the future does not abrogate the fact that she now resides in the Spackenkill school district.

In view of the likelihood of petitioner's success in this appeal, and because petitioner's children will be irreparably harmed if they are not immediately placed in school, I conclude that petitioners' request for interim relief should be granted.

IT IS ORDERED that, pending a final decision on the merits of this appeal, respondent enroll petitioner's children to school in the Spackenkill Union Free School District.

IN WITNESS WHEREOF, I, Thomas Sobol, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 22d day of September, 1987.

Thomas Sobol

Commissioner of Education

III. CASES AND PLEADINGS

B. Pending Cases

1. Orozco v. Sobol

ched, a clear plastic bag labeled
h[illegible]pipe, a triple beam scale,
e li[illegible]or controlled substances.

vernment's position is not aided
timony of Inspector Harnois, who
testified that he did not know
in the bottles, that he had no
in recognizing specific types of
hat he seized a number of bottles
f the "possibility"—not probabili-
hey might contain illegal drugs:
Lipson]: Maybe we can save some
s it your testimony that because
rown bag, which contained some-
ke 12 or 13 different bottles, be-
ou found in that same brown bag
ll bottle that said Super Trip, you
d that anything else in that bag
ntained what looked like medicine
s was something that you could
ould seize from the apartment?
Yes, because of the *possibility*
y one of those capsules could *pos-*
ave been some type of controlled
nce, as opposed to what they were
labeled to be.
And if you had found an aspirin
in that brown bag that had little
tab[illegible] that looked like [they]
hav[illegible]en aspirin, you would have
that because of the possibility that
laced with LSD?
There is that *possibility* which ex-
(emphasis added)

Harnois' testimony that it was
" that the bottles contained illegal
s a matter of law, when law en-
t agents find the quantity of nar-
araphernalia that was present at
's apartment, there is probable
believe that any pill in the apart-
matter the label on it, is an illegal
e which may be lawfully seized if
r requirements of the plain view
are satisfied.

s will contact the courtroom deputy
ge a conference to set a trial date.

SO ORDERED.

Sixta L. OROZCO by her next friend Margarita ARROYO, Plaintiff,

v.

Thomas SOBOL, Individually and as Commissioner of the New York State Department of Education; and Mount Vernon Board of Education; and Dr. William C. Prattella, Individually and as Superintendent of Schools for the City School District of the City of Mount Vernon; and Joseph Williams, Individually and as Attendance Officer of the City School District of the City of Mount Vernon; and Yonkers Board of Education, Dr. Donald Batista, Individually and as Superintendent of the City School District of the City of Yonkers; and Jerry Frank, Individually and as Court Liaison Officer of the City School District of the City of Yonkers, Defendants.

No. 87 Civ. 6822 (GLG).

United States District Court,
S.D. New York.

Nov. 30, 1987.

Action was brought on behalf of seven-year-old child, who was "homeless" within meaning of Stewart B. McKinney Homeless Assistance Act, against New York Commissioner of Education, school district in which emergency housing was located and school district in which mother of child hoped to find permanent residence, alleging various violations of her Fourteenth Amendment rights to due process and equal protection, arising out of school districts' refusal to admit child on grounds of residency requirement. Upon motion for preliminary injunctions, the District Court, Goettel, J., held that child was entitled to preliminary injunction directing school district in which emergency housing was located to enroll her pending decision on merits.

Ordered accordingly.

1. Constitutional Law ⟹277(1)
Schools ⟹148(1)

Seven-year-old "homeless" child, as eligible recipient of public assistance from county department of social services, had property right to free public education under New York Constitution, which could not be abridged or extinguished without child first being accorded protections afforded by due process. Stewart B. McKinney Homeless Assistance Act, § 103(a), 42 U.S.C.A. § 11302(a); McKinney's Const. Art. 11, § 1.

2. Constitutional Law ⟹278.5(7)
Schools ⟹155

Seven-year-old "homeless" child seeking admission into school, who had not yet been admitted to any school, was not necessarily entitled to same procedural due process protections accorded students who are suspended from school: hearing, notice of decision and identification of appellate rights. Stewart B. McKinney Homeless Assistance Act, § 103(a), 42 U.S.C.A. § 11302(a); N.Y.McKinney's Const. Art. 11, § 1; U.S.C.A. Const.Amends. 14, 14, § 1.

3. Schools ⟹153

Child residing in New York did not have unfettered right to tuition-free education at any public school in New York; right to public education was limited by residency requirement. N.Y.McKinney's Education Law §§ 310, 3202, subd. 1.

4. Civil Rights ⟹13.2(4)

Seven-year-old child, who was "homeless" within meaning of Stewart B. McKinney Homeless Assistance Act, was entitled to preliminary injunction directing school district in which emergency housing was located to enroll her pending decision on merits of civil rights action against Commissioner of State Department of Education, school district in which emergency housing was located and school district in which mother of child hoped to find permanent residence; both districts had refused to admit child because of New York's residency requirement. Stewart B. McKinney Homeless Assistance Act, § 103(a), 42 U.S.C.A. § 11302(a); 42 U.S.C.A. § 1983; N.Y.

McKinney's Const. Art. 11, § 1; U.S.C.A. Const.Amends. 14, 14, § 1; N.Y.McKinney's Education Law §§ 310, 3202, subd. 1.

5. Civil Rights ⟹13.2(4)

"Homeless" child was not entitled to preliminary injunction directing State Commissioner of Education to hold hearing and determine which of two school districts should enroll her; preliminary injunction directing one school district to enroll child pending decision on merits sufficiently protected child from irreparable harm pending decision on merits in civil rights action arising out of school districts' refusal to admit child because of New York's residency requirement. Stewart B. McKinney Homeless Assistance Act, § 103(a), 42 U.S.C.A. § 11302(a); 42 U.S.C.A. § 1983; N.Y. McKinney's Const. Art. 11, § 1; U.S.C.A. Const. Art. 3, § 1 et seq.; Amends. 14, 14, § 1; N.Y.McKinney's Education Law §§ 310, 3202, subd. 1.

* * *

Westchester Legal Services, Inc., White Plains, N.Y., for plaintiff; Gerald A. Norlander, Julie A. Mills, of counsel.

Robert Abrams, Atty. Gen. of the State of N.Y., New York City, for defendant Thomas Sobol, Com'r; Stephen M. Jacoby, Asst. Atty. Gen., of counsel.

D'Andrea & Goldstein, Mount Vernon, N.Y., for defendants Mount Vernon Bd. of Educ., Dr. William C. Prattella, and Joseph Williams; Robert Goldstein, of counsel.

Anderson, Banks, Moore & Hollis, Yonkers, N.Y., for defendants Yonkers Bd. of Educ., Dr. Donald Batista, and Jerry Frank; Lawrence W. Thomas, of counsel.

OPINION

GOETTEL, District Judge:

This case is an outgrowth of the myriad of problems confronting our society due to homelessness in America. The immediate issue before this court is deciding the appropriateness of granting a preliminary injunction directing either the Yonkers or Mount Vernon School District to admit a seven year old homeless[1] child into their school system. Although the best interests of the child occupy our principal attention, we are mindful that the case is rife with difficult questions of policy and constitutional law, with profound implications for the Federal judiciary. Similar cases previously have been before the Federal courts, but the case at bar presents certain unique concerns that will become clear as we develop our decision.

I. FACTS

Plaintiff, Sixta Orozco, a United States citizen, was born on November 29, 1980 in Puerto Rico. Plaintiff and her mother, Margarita Arroyo, left Puerto Rico several years ago and lived for a period of time in Mount Vernon, New York. At some point, they returned to Puerto Rico, and plaintiff attended first grade at a public school in San Lorenzo.

In May of 1987, for personal reasons, Ms. Arroyo again left Puerto Rico. She and her daughter returned to New York, spending the night of their arrival (May 18) with friends in Mount Vernon. The following day, Ms. Arroyo applied for public assistance with the Westchester County Department of Social Services ("DSS"). Her case was accepted, and DSS immediately provided the family with emergency housing at the Trade Winds Motel in Yonkers, New York. The family remains at that location.

Despite the fact that the family, at least temporarily, resides in Yonkers, Ms. Arroyo claims contacts with Mount Vernon and hopes to find permanent residence there. Consequently, she sought to enroll her daughter in the Mount Vernon school system. In August, she contacted the cen-

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[1] Our use of the term "homeless" is consistent with the definition supplied under the Stewart B. McKinney Homeless Assistance Act, Pub.L. No. 100-77, § 103(a), 101 Stat. 482, 485 (1987) (to be codified at 42 U.S.C. § 11302(a)), which provides in pertinent part: "[T]he term 'homeless' or 'homeless individual' includes—(1) an individual who lacks a fixed, regular, and adequate nighttime residence; and (2) an individual who has a primary nighttime residence that is—(A) a supervised publicly or privately operated shelter designed to provide temporary living accommodations (including welfare hotels . . .). . . ."

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tral offices of the Mount Vernon Board of Education. Ms. Arroyo maintains that unnamed employees of the Mount Vernon Board advised her that plaintiff could enroll at the Hamilton Elementary School in Mount Vernon. On September 9, Ms. Arroyo went to the Hamilton School to register her daughter for classes, but apparently was told that plaintiff could not be registered since the family resided in Yonkers, not Mount Vernon. Ms. Arroyo returned to the central offices of the Mount Vernon Board, and this time was directed to contact the Yonkers Board of Education.

It appears that no "hearing," however minimal, was held and that no written notice was provided to Ms. Arroyo explaining the basis of the decision and her options. Those options include the right to appeal the local decision to the State commissioner of education pursuant to N.Y.Educ.Law § 310 (McKinney 1969 & Supp.1987) ("section 310").[2] On the other hand, Ms. Arroyo must have understood that the reason for Mount Vernon's decision was that DSS was sheltering her and her child in Yonkers and not in Mount Vernon.

On September 10, Ms. Arroyo contacted the Yonkers Board of Education. An unnamed employee of the Board apparently advised her that, because the family did not permanently reside in Yonkers, plaintiff could not be enrolled in the Yonkers school system. She did not make a more formal application and no hearing or notice was provided to Ms. Arroyo.

A caseworker for the DSS then contacted defendants Joseph Williams, Attendance Officer for the Mount Vernon School District, and Jerry Frank, Court Liaison Officer for the Yonkers School District. Each advised the caseworker that the plaintiff belonged in the other's school system.

At that point, rather than filing an appeal with the commissioner of education pursuant to section 310, plaintiff (by her attorney, the Westchester Legal Services, Inc.) filed a complaint with this court on September 22 under 42 U.S.C. § 1983, alleging various violations of her fourteenth amendment rights to due process of law and equal protection under the law. Plaintiff immediately moved for a temporary restraining order and preliminary injunction (1) directing that Mount Vernon school officials temporarily enroll plaintiff in the Mount Vernon school system and (2) directing that the commissioner of education hold a hearing on plaintiff's case and render a decision as to which school district, Mount Vernon or Yonkers, should officially enroll plaintiff.

On September 24, we granted a temporary restraining order directing that plaintiff immediately be registered in the Yonkers school system. That order was extended by stipulation of the parties, and so ordered by this court, until November 20, the date set for oral argument on the present motion. On November 20, we ordered that plaintiff be allowed to remain in the Yonkers school system pending our decision on the motion, which was agreed to by the Yonkers School District. We now consider plaintiff's request for a preliminary injunction and, for the reasons that follow, grant a preliminary injunction extending plaintiff's enrollment in the Yonkers school system until the merits of this case are decided, but deny plaintiff's request for injunctive relief against the State commissioner of education.

II. DISCUSSION

The standards for injunctive relief in this circuit are well established. Plaintiff must show "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir.1979) (per curiam).

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[2] Section 310 provides in pertinent part:

> Any party conceiving himself aggrieved may appeal by petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article. The petition may be made in consequence of any action:
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> 7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools.

There can be no doubt that plaintiff could suffer irreparable harm if she is denied attendance at a New York public school. "[I]nterruption of a child's schooling[,] causing a hiatus not only in the student's education but also in the other social and psychological development processes that take place during the child's schooling, raises a strong possibility of irreparable injury." *Ross v. Disare*, 500 F.Supp. 928, 934 (S.D.N.Y.1977). We agree with plaintiff's counsel that this possibility is heightened even further when, as here, the child is likely to receive little or no home instruction. Public schooling will provide this plaintiff with a crucial and desperately-needed foundation. Among other things, the plaintiff is not fluent in English, which is a substantial handicap to immigrants and Puerto Ricans. The educational and social maturity she loses, forfeited as a result of forces well beyond her control, could constitute irreparable harm under any reading of that terminology.

It is in satisfying the second prong of the *Jackson Dairy* test whereby plaintiff seeks to send this court into uncharted and potentially hostile waters. Although this court will not shirk its duty and responsibility to protect individual rights, we have determined it best to tread warily in this case. As the Supreme Court wisely cautioned:

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint.... By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.

Epperson v. Arkansas, 393 U.S. 97, 104, 89 S.Ct. 266, 270, 21 L.Ed.2d 228 (1968).

If injunctive relief is proper, as against either the local school districts or the State, plaintiff must show a likelihood of success on the merits or, at a minimum, sufficiently serious questions going to the merits that injunctive relief is warranted in light of the hardships tipping in her favor. Notwithstanding a spurious equal protection claim (which we understand plaintiff wisely intends to delete via amended complaint), the crux of the merits center on alleged violations of the Due Process Clause of the fourteenth amendment.[3]

[1] In determining "whether due process requirements apply in the first place, we must look ... to the *nature* of the interest at stake." *Board of Regents v. Roth*, 408 U.S. 564, 570–71, 92 S.Ct. 2701, 2705–06, 33 L.Ed.2d 548 (1972) (emphasis in original). Here, the New York Constitution expressly directs that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein *all of the children of this state* may be educated." N.Y. Const. art. XI, § 1 (emphasis added). Although there is considerable debate in this case as to what constitutes plaintiff's *legal* residence, there can be no doubt that, as an eligible recipient of public assistance from the Westchester County DSS, plaintiff *actually* resides in New York and is a child of this State. As such, she is entitled to a free public education under the New York Constitution, a property right that can not be abridged or extinguished without plaintiff first being accorded the protections afforded by due process. Indeed, none of the defendants contests this fact. As the Supreme Court concluded in a similar though distinguishable case in language adaptable to the instant facts:

> Although [New York] may not be constitutionally obligated to establish and maintain a public school system, [*San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 35, [93 S.Ct. 1278, 1297, 36 L.Ed.2d 16] (1973),] it has neverthe-

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[3] The Due Process Clause provides: "... nor shall any State deprive any person of life, liberty, or property, without due process of law...." U.S. Const. amend. XIV, § 1.

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> less done so.... [Accordingly,] the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause....

Goss v. Lopez, 419 U.S. 565, 574, 95 S.Ct. 729, 737, 42 L.Ed.2d 725 (1975).[4]

Having determined that plaintiff is entitled to due process protection, we are left with the more difficult questions in this case of how much process is due and who must provide it. Although, at this stage, we need not definitively resolve these issues, we must, at a minimum, satisfy ourselves as to the sufficient seriousness of these questions, and balance the relevant hardships, if injunctive relief is to issue against any or all of the defendants.

The Local School Districts

[2, 3] Plaintiff argues that the local school districts must provide her with a hearing and notice of their decision, including identification of appellate rights, pursuant to *Goss v. Lopez* and *Takeall v. Ambach,* 609 F.Supp. 81 (S.D.N.Y.1985). In *Goss,* the Supreme Court held that where disciplinary action will result in a student's suspension from school, the student is entitled to the minimum due process protections of notice and hearing. *Goss,* 419 U.S. at 579, 95 S.Ct. at 738. If suspension from school triggers due process protection, plaintiff argues, then surely local school districts must provide notice and hearing if they are to deny a prospective student admission to school altogether. We do not find that argument compelling. Certainly, if plaintiff had been enrolled in the Mount Vernon or Yonkers school system, her removal from school would trigger, at a minimum, *Goss*-like protection. Such is not the case. Plaintiff sought admission to a school, but had not yet been admitted to any school.

In that vein, plaintiff does not have an unfettered right to a tuition-free education at *any* public school in New York. Indeed, if that were so, local school districts would have to provide notice and hearing to any prospective student seeking admission, for whatever reasons, to a given school. Instead, plaintiff's right is limited by a residency requirement embodied in N.Y. Educ.Law § 3202(1) (McKinney 1981), which provides in pertinent part: "A person over five and under twenty-one years of age who has not received a high school diploma is entitled to attend the public schools maintained in the district in which such person resides without the payment of tuition." The question, therefore, is squarely presented. What type of hearing should be conducted, and by whom, in settling an inter-district dispute over establishing plaintiff's residency under N.Y. Educ.Law § 3202?

The position of the parties may be summarized as follows. Mount Vernon points out that the plaintiff and her mother have not resided in that town for some years and that a one-night stopover on her return from Puerto Rico can scarcely premise any obligation on its part. Yonkers argues that the plaintiff and her mother are physically within its bounds through the choice of DSS and that they do not intend or wish to remain there. The commissioner maintains that one of the school districts is wrong, but he is not prepared to say which unless a section 310 appeal is filed and he is allowed to proceed to a quasi-judicial determination. The plaintiff argues that such a procedure is too slow and burdensome to satisfy due process.

Plaintiff's purported remedy to the situation, a hearing and written notice requirement, although a convenient due-process hook by which to involve the Federal courts, is in fact no solution to the plaintiff's problem at all. There do not appear to be any disputed facts requiring a hearing. The positions of the defendant school districts are well known to the plaintiff, and putting them in writing accomplishes little. The simple remedy, at least for this plaintiff, is a directive or ruling from the commissioner settling the inter-district dispute.

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[4] Although less clear in this case, liberty interests may also be implicated. *See Goss,* 419 U.S. at 574–75, 576, 95 S.Ct. at 737 (holding liberty interests implicated by school suspensions).

No guidelines exist to aid school districts in settling these disputes; neither the State legislature nor the State Department of Education has acted to fill this void. Local school districts are left to fend for themselves on an ad hoc basis, leaving aggrieved students and their families with the responsibility of appealing to the commissioner of education pursuant to N.Y. Educ.Law § 310, *supra* note 2. Of course, if those same students and families are not apprised of this appellate right, one is left wondering how it can be exercised.

The failure of legislative and/or regulatory leadership on this issue is at the center of this action. Perhaps in this age when legislators won't legislate and regulators won't regulate, preferring instead to spend their time carping at Federal judges who ultimately must step into the breach to protect individual rights from the capriciousness of ad hoc decision making, one should not be surprised at this state of affairs. On the other hand, it sadly leaves the goal of judicial restraint as a forgotten dream as we are forced to devote our energies full time to safeguarding constitutionally-protected rights from being sucked up in the vacuum of legislative and regulatory dereliction.

This court is all too directly and keenly aware of the thorny policy choices this case, and others like it, present. We also recognize that legislative haste can make political waste; but plaintiff and the hundreds (or thousands) like her do not have the luxury of waiting for that slumbering giant in Albany to work its will.[5] Although we can not and need not say with certainty at this stage that a hearing is the constitutionally-mandated solution, nor do we need now resolve who has the initial responsibility for holding such a hearing, these certainly are sufficiently serious questions going to the merits, and the hardships tip so very decidedly in plaintiff's favor, that preliminary injunctive relief against one of the local school districts is warranted. Although *Takeall v. Ambach* appears to have involved a student who, like *Goss*, was already within the school district's control before his dismissal,[6] the applicability of *Takeall* (which required a local school dis-

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[5] On July 22 of this year, the Stewart B. McKinney Homeless Assistance Act, Pub.L. No. 100-77, 101 Stat. 482 (1987) (to be codified at scattered sections of the U.S.C.), was enacted. Title VII of that Act directs each State to adopt a plan providing for the education of homeless children within its borders, such plan to include "procedures for the resolution of disputes regarding the educational placement of homeless children and youth." *Id.* at § 722(e)(1)(B), 101 Stat. at 526. The statute notes that "the causes of homelessness are many and complex" and that "there is no single, simple solution." *Id.* at § 102(a)(3) & (4), 101 Stat. at 484. The defendant commissioner cites this language as a means of explaining State legislative and regulatory delays on this issue.

No matter how complex or difficult the issues, this court, and, more importantly, the plaintiff, can not sit idly by when fundamental, constitutional rights are at jeopardy. Further, Albany hardly needed to be told by the United States Congress that there were problems associated with ensuring the education of the homeless that needed solutions. State officials have been aware generally of these problems since (at the latest) *Vaughn v. Board of Educ. of Union Free School Dist. No. 2*, 64 Misc.2d 60, 314 N.Y.S.2d 266 (Sup.Ct.1970). We are advised by counsel that in response to this court's decision in *Takeall v. Ambach*, 609 F.Supp. 81 (S.D.N.Y.1985), legislation specifically addressing inter-district residency disputes was introduced in the New York State legislature. Over seventeen years after *Vaughn*, and two and one-half years after *Takeall*, we are again confronted with a similar case, and still there are no guidelines. We would prefer that the legislature or the commissioner act to fill this void. Today's decision will provide further time for action; hopefully it will also provide the impetus.

[6] The *Takeall* facts suggest that the plaintiff, resident of a group home in White Plains, had received tacit admission into the White Plains school system, with the system's Committee on the Handicapped then charged with deciding on an appropriate placement. *Takeall*, 609 F.Supp. at 83. On September 29, five months after plaintiff first contacted the White Plains school system about enrolling, the Committee determined that plaintiff was emotionally disturbed and should be placed in the New York Hospital program. *Id.* In the interim, it appears plaintiff had moved out of the group home and into the home of an unrelated adult. *Id.* It was not until October 7, and after this later move by plaintiff, that the White Plains Board of Education decided, without sufficient notice and hearing, that the plaintiff was not a resident of White Plains for purposes of N.Y.Educ.Law § 3202. *Id.* The plaintiff in the case at bar has not been admitted, tacitly or otherwise, to either the Mount Vernon or Yonkers school system.

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trict to provide notice and hearing before excluding a student on grounds of non-residency) to the instant case is a serious question going to the merits. At this stage, however, without the benefit of a full hearing on the merits, we decline to direct a local school district(s) to provide plaintiff with notice and hearing on the residency question.

[4] In the interim, until the merits are reached, a preliminary determination permitting plaintiff to attend school must be made. This case is unlike *Matter of Richards*, 25 Ed.Dep't Rep. 38 (July 17, 1985), which addressed residency in the context of students who were established New York residents and already members of a school district and then became homeless. Likewise, traditional legal concepts used to establish legal domicile—physical presence coupled with an intent to remain indefinitely—are unavailing since, whatever the family's intent, Westchester County DSS largely will control the locus of plaintiff's residence.[7] When we granted the temporary restraining order in this case, we believed it more likely that plaintiff would be able to establish residency for school attendance purposes in Yonkers, rather than Mount Vernon. We continue to adhere to that view. As noted, regardless of her desire to live in Mount Vernon, Ms. Arroyo's situation is controlled largely by the DSS and where they place her. We believe, therefore, that in this case the DSS placement should operate presumptively as plaintiff's legal residence. Accordingly, we grant a preliminary injunction, but against the Yonkers, and not the Mount Vernon, School District. We direct the Yonkers School District to continue to educate plaintiff tuition-free, as long as the family continues to live under current or similar conditions in Yonkers, until the merits of this case are decided.

The Commissioner of Education

[5] Plaintiff next seeks a preliminary injunction against the State commissioner of education, initially on the ground that the section 310 appeals procedure is far too complex, burdensome, and time-consuming to satisfy any reasonable standard of due process. Plaintiff, however, has not availed herself of the section 310 process; she instead filed a section 1983 claim with this court. This initial claim against the State, therefore, is based on speculation and may not be ripe for adjudication. *United Public Workers v. Mitchell*, 330 U.S. 75, 89–91, 67 S.Ct. 556, 564–65, 91 L.Ed. 754 (1947). Just as importantly, there is a serious question whether plaintiff has standing to bring a section 1983 claim against the State on this ground. Plaintiff has not suffered actual injury as a result of a section 310 appeal since one has not yet been initiated. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471–76, 102 S.Ct. 752, 757–61, 70 L.Ed.2d 700 (1982) (discussing constitutional underpinning for "actual injury" standing requirement). Consequently, there is a serious question as to whether a "case" or "controversy" has been presented to the court on the section 310 question. U.S. Const. art. III, § 2.[8]

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[7] We note parenthetically, but interestingly, that Westchester County DSS, which obviously plays a great role in this whole scenario, is not a party to this suit.

[8] Plaintiff's reply brief on the instant motion correctly argues that she need not exhaust State judicial or administrative remedies before pursuing a section 1983 remedy. *Monroe v. Pape*, 365 U.S. 167, 183, 81 S.Ct. 473, 482, 5 L.Ed.2d 492 (1961); *Patsy v. Board of Regents*, 457 U.S. 496, 515, 102 S.Ct. 2557, 2567, 73 L.Ed.2d 172 (1982). Plaintiff's reliance on these rules as a shield against ripeness or standing objections misconstrues, we think, the applicability of those holdings in this case. Plaintiff initially challenges the local school districts' decisions denying her admission, claiming those actions fail to meet due process standards. To the extent plaintiff meets the "case" and "controversy" requirements of article III and satisfies related jurisprudential considerations, *Valley Forge*, 454 U.S. at 471–76, 102 S.Ct. at 757–61, we would violate the mandates of *Monroe* and *Patsy* if we were to decline jurisdiction over that claim on an exhaustion theory. Whatever the commissioner's authority in this case, it remains at all times the prerogative of this court to determine the constitutionality of the actions taken by the local school districts. That is distinguishable from plaintiff's second claim that the section 310 appeal process, of which she has yet to avail herself, also is violative of due

We recognize that plaintiff must clear many hurdles to sustain an action in Federal court, and we suspect that her counsel has not initiated a section 310 appeal in an attempt to sidestep altogether one such hurdle—mootness. Had plaintiff initiated a section 310 appeal when this case was filed (September 22), a decision from the commissioner would surely have by now been rendered—no matter how flawed or imperfect the process—thereby *potentially* mooting plaintiff's claim against the State. *Cf.* M. Schwartz & J. Kirklin, *Section 1983 Litigation: Claims, Defenses, and Fees* § 13.5 (1986) (discussing mootness and "capable of repetition, yet evading review" exception).

Given the fact that our earlier grant of injunctive relief protects plaintiff from whatever irreparable harm may attach pending review of this case on its merits, and mindful of our need to tread warily, *Epperson*, 393 U.S. at 104, 89 S.Ct. at 270, (cited in full *supra*), we think the balance of hardships weighs heavily against this request. This is particularly so when a grant of injunctive relief may have the effect of scuttling an administrative plan that has not yet been tested by this plaintiff. When regulators do regulate, we should avoid interposing our will without concrete evidence of the regulation's constitutional failings.

Apparently in recognition of this potential weakness, and in furtherance of the broader agenda clearly afoot here,[9] plaintiff's counsel sought at oral argument on the instant motion to shift the focus of the injunctive claim against the State. Plaintiff now asks that we direct the commissioner, and not the local school districts, to hold the initial hearing in a potential interdistrict dispute—this despite the fact that the complaint itself makes clear that plaintiff seeks declaratory injunctive relief against the State for failure to establish an adequate mechanism to review residency determinations *after* initial hearings by local school districts.[10] Again, we hasten to emphasize that our earlier grant of injunctive relief against the Yonkers School District protects the plaintiff from further harm pending a decision on the merits. Given that fact, and for policy reasons previously highlighted, we are especially reluctant, on a request for a preliminary injunction, to effectively construct via judicial caveat a new regulatory scheme to deal with these issues.

At oral argument on the instant motion, plaintiff offered a convoluted hodgepodge of possible injunctive remedies against the State. Any relief that this court might provide which will operate as an end run on the legislative and regulatory processes must be better thought out. Thus, we

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process. Suggesting that this separate and distinct claim may not comport with the "case" and "controversy" requirements of article III is not akin to requiring an exhaustion of administrative remedies—it goes to the very substance of this second claim. We confidently can assure plaintiff that *Monroe* and *Patsy*, whatever else their implications, do not vitiate the "case" and "controversy" requirements of article III of the Constitution.

[9] We note here our concern that in serving this broader agenda, counsel may not be serving adequately plaintiff's needs. A servant to two masters serves neither well. Although plaintiff's counsel may feel the need to seek social reform through Federal litigation (which appears to have become a customary vehicle in the last thirty years), we remind them that an attorney's first allegiance must be to the interests of the client.

[10] The notice of motion is somewhat ambiguous. It asks for a preliminary injunction enjoining the collective defendants from excluding plaintiff "without first providing plaintiff adequate written notice of the factual and legal basis [sic] for any proposed denial of educational services, *and* without first providing plaintiff and her parent an opportunity for an evidentiary hearing and final decision on her request for admission to school by the New York State Commissioner of Education." (Emphasis added.) Not only is it somewhat unclear as to which of the collective defendants is responsible for providing the "adequate written notice" requested, it also is unclear which form of relief actually is to be "first provid[ed]" if both are to be "first provid[ed]." We might add, however, that this is typical of plaintiff's "birdshot approach" to the motion; *i.e.*, try to cover as much area as possible with one blast. As should seem obvious at this point, we decline plaintiff's invitation to join in the hunt on a motion for preliminary injunctive relief, choosing instead for the reasons articulated to tailor more narrowly the preliminary remedy.

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think it prudent to deny this request and wait for a full hearing of the issues.[11]

Of course, it may never get that far. The commissioner puts forth a plethora of constitutional barriers to plaintiff's claims, ranging from administrative immunity, to the eleventh amendment, to abstention. The State's attorney advises the court that a motion to dismiss plaintiff's claims against the commissioner will be forthcoming, so several of these issues are likely to be resolved in due course. Although we intimate no prejudice to plaintiff's claims against the State, and in light of the fact that plaintiff is protected from irreparable harm by virtue of our preliminary injunction against the Yonkers School District, we think the above considerations militate *against* a grant of injunctive relief directed to the State on the grounds asserted.

CONCLUSION

For all of the foregoing reasons:

(1) preliminary injunctive relief against the Yonkers School District is granted, and the District is directed to continue plaintiff's education, as long as the family continues to live under current or similar conditions in Yonkers, until the merits of this case are decided; and

(2) plaintiff's request for preliminary injunctive relief against the State commissioner of education is denied.

SO ORDERED.

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[11] We continue to believe that the most effective solution to the problem here presented is legislation or the promulgation by the commissioner of regulations or guidelines which will at least presumptively govern these inter-district school disputes. Although section 310 appeals may be necessary in some cases, a straightforward situation, such as we have here, should be determinable by published regulations.

Carlos DeLEON, Petitioner,

v.

Charles SCULLY, Superintendent of Green Haven Correctional Facility, Respondent.

No. 86 Civ. 6341 (PKL).

United States District Court,
S.D. New York.

Dec. 2, 1987.

Habeas petitioner applied for certificate of probable cause to appeal denial of his petition. The District Court, Leisure, J., held that petitioner had not exhausted all available state remedies on his double jeopardy claim and thus was not entitled to certificate of probable cause.

Application denied.

1. Habeas Corpus ⟹45.3(9)

"Exhaustion doctrine" requires that prisoner seeking to upset his conviction on federal grounds must have given state courts fair opportunity to review his federal claim and to correct alleged error. 28 U.S.C.A. § 2254(b, c).

See publication Words and Phrases for other judicial constructions and definitions.

2. Habeas Corpus ⟹113(6)

Habeas petitioner was not entitled to certificate of probable cause to appeal denial of his petition in light of his failure to exhaust all available state remedies on double jeopardy claim, which he had not raised during trial or on direct appeal. 28 U.S.C.A. §§ 2253, 2254(b, c); F.R.A.P.Rule 22(b), 28 U.S.C.A.

Paul E. Kerson, New York City, for petitioner.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT COURT OF NEW YORK
****

SIXTA L. OROZCO
By her next friend
Margarita Arroyo,

Plaintiff,

-against-

87 Civ. 6822
(GLG)

THOMAS SOBOL, Individually and
as Commissioner of the New York
State Department of Education; and

MOUNT VERNON BOARD OF EDUCATION; and
DR. WILLIAM C. PRATTELLA, Individually
and as Superintendent of Schools for
the City School District of the
City of Mount Vernon; and
JOSEPH WILLIAMS, Individually and as
Attendance Officer of the City School
District of the City of Mount Vernon; and

YONKERS BOARD OF EDUCATION, DR. DONALD
BATISTA, Individually and as Superintendent
of the City School District of the City of
Yonkers; and JERRY FRANK, Individually
and as Court Liaison Officer of the
City School District of the City of Yonkers.

Defendants.

****

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

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Tel. (914) 949-1305

Attorneys for Plaintiff

Preliminary Statement

Six year old Sixta L. Orozco, by her mother and Next Friend, Margarita Arroyo, brings this action for declaratory and injunctive relief and damages pursuant to 42 U.S.C. {1983. Sixta is a "homeless" child who lives with her mother, a recipient of public assistance, in a motel. Sixta has been denied school admission by both the Mount Vernon schools and the Yonkers schools, apparently on the ground of nonresidence, and as a result she is not attending school. Mount Vernon school officials apparently contend that she is a resident of Yonkers because the motel where she now stays is within the Yonkers City limits. The Yonkers school officials, however, contend that Sixta is only temporarily in Yonkers and that her legal residence for school attendance purposes is Mount Vernon.

The denials of admission to school occurred without timely written notice by local school officials of the factual and legal basis for their actions, and without an opportunity for a hearing and final determination by the State Commissioner of Education, who has no swift or simple procedure available to denied school applicants to resolve such disputes over their residence.

Plaintiff contends that the defendants' acts, omissions, practice and policy to terminate education for children on the ground of alleged nonresidence without prior, adequate written notice and an opportunity for a hearing before an impartial decision maker and final decision of the Commissioner of Education violates the Due Process Clause of the Fourteenth

Amendment to the United States Constitution. Plaintiff contends that if there had been an opportunity for an evidentiary hearing before an impartial decision maker, facts could have been demonstrated and argument made that she should be considered a resident of the City of Mount Vernon for school purposes, that she had not taken up or intended to take up any new residence in the City of Yonkers, and that her present abode is not a home but a motel out of the district that is paid for by the Westchester County Department of Social Services pending her return to Mount Vernon. Pending a final decision in this case, plaintiff seeks a preliminary injunction (1) enjoining the Mount Vernon school officials to admit her to attendance upon instruction in the Mount Vernon Schools, and (2) enjoining the State Commissioner to provide an opportunity to the plaintiff for a hearing on her claim of entitlement to attend school, and directing the State Commissioner to render a decision after a hearing determining whether the plaintiff should attend school in Mount Vernon or in Yonkers.

POINT I

A PRELIMINARY INJUNCTION SHOULD ISSUE, DIRECTING THE MOUNT VERNON DEFENDANTS TO ADMIT THE PLAINTIFF TO THE MOUNT VERNON PUBLIC SCHOOLS

A preliminary injunction is appropriate where a party shows irreparable harm and either likelihood of success on the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in its favor. Kaplan v. Board of Education,

759 F.2d 256, 259 (2d Cir. 1985); Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 206-207 (2d Cir. 1979); Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979); Sonesta International Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (2d Cir. 1973); Westchester Legal Services v. County of Westchester, 607 F. Supp. 1379 (S.D.N.Y. 1985); Tavaro S.A. v. Jolson, 591 F. Supp. 846, 853 (S.D.N.Y. 1984). As is amply demonstrated below, plaintiff satisfies this test because she is likely to succeed on the merits, and she has been, and will continue to be, irreparably injured by exclusion from public school.

A.

PLAINTIFF IS SUFFERING IRREPARABLE INJURY

The plaintiff belongs in school. With each passing day, Sixta Orozco is losing the opportunity to learn from teachers, and she is denied the opportunity to make new friends and interact in a learning environment with her peers. Instead, she is relegated to spend her days impoverished in a motel, isolated and cut off from the mainstream of life, denied her right to attend public school, the most important public institution that affects her life and future.

Irreparable injury occurs whenever school children are barred from school attendance, and it is appropriate for the Court to grant equitable relief to avoid or minimize it. See, Certain Named and Unnamed Non-Citizen Children and Their Parents v. Texas, 448 U.S. 1327, 1333-34, 101 S.Ct. 12, 15-16 (Powell, J.) (Children allowed to attend school pending Supreme Court decision on merits).

Even a disciplinary suspension from school, "is a serious event in the life of the suspended child." Goss v. Lopez, 419 U.S. 565, 576, 95 S.Ct. 729, 737 (1975). As stated by Judge Cannella,

> "[I]nterruption of a child's schooling causing a hiatus not only in the student's education but also in other social and psychological developmental processes that take place during a child's schooling, raises a strong possibility of irreparable injury."

Ross v. Disare, 500 F.Supp. 928, 934 (S.D.N.Y. 1977). Here, where a child has been totally excluded from school, and is not even receiving homebound instruction, the deprivation is permanent and thus more severe than a disciplinary suspension.

While any denial of schooling is likely to injure a child, for the "homeless" child living in stressful circumstances in a motel, school attendance is doubly important. "[A]ttending the local school remains one of the only stable links left to such a family...." Fulton v. Krauskopf, 127 Misc. 20, 23, 484 N.Y.S.2d 982, 985 (Sup. Ct. N.Y. Co.) (Greenfield, J.), modified and aff'd sub nom McCain v. Koch, 117 A.D.2d 198, 219 - 220, 502 N.Y.S.2d 720, 733 -734, aff'd on other grds 70 N.Y.2d 109 (Department of Social Services required to provide school transportation for homeless children in temporary housing). Homeless children suffer to a greater degree the adverse social and psychological impacts of dislocation and disorientation, even temporarily during a housing crisis. As was recently observed:

> [A] child builds a little family in the classroom. The teacher is the mother figure and the routines are familiar even down to the way the class lines up at the door. The student knows what to expect of the teacher and what the teacher expects of him or her....
>
> Student mobility is seldom acknowledged as a problem by critics of the schools, but some experts suspect it is important in undermining the ability of youngsters from deprived backgrounds to build a solid foundation for learning. Unlike the children of corporate executives or military personnel, who may also endure frequent relocation, the children of the poor are less likely to be able to fall back on their families to cushion the impact.

"Frequent Moves Affect Schoolwork," N.Y. Times, Nov. 27, 1984, p.C1, col.7. For the indigent, "homeless" child it is the school, familiar teachers and school friends who may provide the real stability and consistency they need to foster an environment where they can benefit from an opportunity to grow socially and intellectually.

Recognizing the importance of schooling for the plaintiff, the Westchester County Department of Social Services is cooperating fully, (See Exhibit "A" to Complaint), and has attempted to assist the plaintiff in her effort to enroll in school, but school officials of Mount Vernon and Yonkers have asserted that the plaintiff is a resident of the other's district and summarily barred her from attendance.

It is important to protect the educational interests of the plaintiff during the pendency of this action, which tests the adequacy of defendants' procedures for determining residence of "homeless" children. In sharp contrast to the injury plaintiff is suffering, the defendant educators would be hard pressed to show how they could be injured by educating the plaintiff pending a final decision on her claims. Indeed, they would fulfill their professional calling by teaching the plaintiff.

Furthermore, it is in the national interest for this Court to exercise its equity powers to require defendants to educate the plaintiff. Congress recently enacted legislation to address situations such as this, which provides as follows:

> "It is the policy of Congress that --
> (1) each State educational agency shall assure that each child of a homeless individual and each homeless youth have access to a free, appropriate public education which would be provided to a resident of a State and is consistent with the State school attendance laws; and
> (2) in any State that has a residency requirement as a component of its compulsory school attendance laws, the State will review and undertake steps to revise such laws to assure that the children of homeless individuals and homeless youth are afforded a free and appropriate public education."

Stewart B. McKinney Homeless Assistance Act, P.L. 100-77, Section 721. The Legislative history of the Act provides as follows, in pertinent part:

> "The purpose of this subtitle is to make plain the intent and policy of Congress that every child of a homeless family and each homeless youth be provided the same opportunities to receive free, appropriate educational services as children who are residents of the state. No child or youth should be denied access to any educational services simply because he or she is

homeless. Of particular concern are potential disputes between school districts over the placement of these children, which could result in the homeless being denied an education in any school district."

House Conference Report No. 100 - 174, p.93, 7 U. S. Cong. News 472 (September, 1987). (Emphasis supplied). Defendants' acts and omissions obviously thwart the expressed will of Congress, and they should be enjoined to admit the plaintiff to school pendent lite in furtherance of Congressional policy. Thus, the balance of hardships and considerations of national policy decidedly point in favor of granting the motion for preliminary relief.

B. THE MERITS

DEFENDANTS' PROCEDURE FOR EXCLUDING "HOMELESS" PUPILS ON THE GROUND OF NONRESIDENCE WITHOUT ANY NOTICE OR HEARING VIOLATES DUE PROCESS OF LAW

The starting point for due process analysis is a determination whether the plaintiff's interest in school attendance is protected at all by the due process clause. In Goss v. Lopez, 419 U.S. 565, 579, 95 S.Ct. 729, 738 (1975), the Supreme Court held that even a ten day suspension from school affects a pupil's property interest in a public education. The Court held that minimal due process must be afforded before a temporary deprivation occurs, and left open the question of what process is due in longer term suspensions. Because this case involves a total deprivation of schooling, it should follow that plaintiff's claim of a right to be educated cannot be extinguished without due process of law. Although the plaintiff is an applicant not currently receiving the benefit of education, she nonetheless has a legitimate claim of entitlement to education that is grounded in the New York State Constitution and state law. Article XI of the New York Constitution provides as follows:

> "The legislature shall provide for the maintenance and support of a system of free, common schools, wherein all the children of this state may be educated."

N.Y. Const. Art. XI, Sec. 1. Implementing the Constitutional mandate, Section 3202 of the New York Education Law provides as follows, in pertinent part:

> "A person over five and under twenty-one years of age who has not received a high school diploma is entitled to attend the public schools maintained in the district in which such person resides without the payment of tuition.

N.Y. Education Law, §3202. Thus, plaintiff has a clear claim of entitlement to an education under state law. The Supreme Court has recognized that the due process clause applies to situations where an applicant's claim of entitlement is extinguished by government action. Board of Pardons v. Allen, __ U. S. 55 U.S.L.W. 4799 (June 9, 1987). Cf., Gregory v. Town of Pittsfield, 470 U.S. 1018 (1985) (Dissenting opinion). The Court of Appeals for the Second Circuit has articulated the standard for determining whether an applicant has a protected property interest subject to the requirements of the due process clause, as follows:

> "[T]he question of whether an applicant has a legitimate claim of entitlement to [a benefit] should depend on whether, absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the application would have been granted. Otherwise the application would amount to a mere unilateral expectancy not rising to the level of a property right guaranteed against deprivation by the Fourteenth Amendment."

Sullivan v. Salem, 805 F.2d 81, 85 (2d Cir. 1986). Clearly, the plaintiff's claim of entitlement to attend school is not one subject to discretionary denial. Cf., Dean Tarry v. Friedlander, __ F.2d __ (2d Cir. August 24, 1987); Yale v. Johnson, 758 F.2d 54 (2d Cir. 1985). Rather, like the claim in Sullivan, it is a legitimate claim of entitlement that surely qualifies as one that may not be extinguished without due process of law. Sullivan, supra. Thus, the question turns to what process is due homeless persons whose applications for education are denied by local school officials.

In general, due process requires notice and a timely hearing. Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 313 (1950). It is evident that the defendants gave no advance written notice of their action. This simple requirement - a short letter or even a form - is generally required by due process, Mennonite Board of Missions v. Adams, 103 S.Ct. 2706, 2712 (1983) (Mailed notices required even for sophisticated parties). Significantly, the Supreme Court stated,

> "[P]articularly extensive efforts to provide notice may often be required when the State is aware of a party's inexperience or incompetence...."

Id., at 2712. In addition to written notice of the decision itself, which should contain the factual and claimed legal basis for the action, notice should contain information about any existing avenues for administrative redress. Memphis Light, Gas and Water Division v. Craft, 436 U.S.1, 14, 98 S.Ct. 1554, 1563 (1978); Takeall v. Ambach, 609 F.Supp. 81 (S.D.N.Y. 1985) (Gagliardi, J.) (Written notice of reasons and avenues for administrative redress required by due process for school applicant). Information about the possible availability of assistance for poor persons from legal services organizations or other community organizations should also be provided, particularly for those who are homeless and who may lack the assistance of friends or familiarity with the organizations that can provide advocacy or other assistance. The absence of such notice of the action taken by the school officials was in violation of due process of law.

In Takeall v Ambach, supra, this Court required the White Plains schools to provide written notice to a denied school applicant, including notice of the right to appeal to the State Commissioner of Education under Section 310 of the New York Education Law. Under the state's statutory scheme, this appears to be the only remedy available to review the decision of local school officials. The constitutional adequacy of the apparent avenue for redress is doubtful, particularly for homeless children and their parents. An appeal under Section 310 of the New York Education Law is time consuming, costly, and so complex in procedure that it provides no meaningful remedy to the typically unrepresented pupil or parent. Indeed, the Rules promulgated by the State Commissioner do not provide any expedited or simplified review for cases where a pupil's right to attend school is implicated. Instead, his filing, service, and pleading requirements are more onerous than those of this court. For example, there is no provision in the Commissioner's rules for waiver of filing fees for indigent persons. There is no provision for service of process by certified mail. A formal notice of petition is required, a well-pled verified petition must be filed, and there is no opportunity for an oral, evidentiary hearing. In sharp contrast, New York statutes give pupils and parents detailed evidentiary hearing rights for any exclusion of more than five days for disciplinary reasons,[1] any involuntary transfer,[2] and any change in the placement of a handicapped child.[3] The absence of any meaningful process for the denied school applicant is thus an anomaly. The provision of extensive procedural protection for students faced with lesser deprivations renders unconvincing any argument that it would be administratively inconvenient to provide notice and a hearing to the plaintiff. In determining residence for public school purposes, the authoritative decisions look to the family's community contacts, nature of abode, express intent, and if outside the district, their reason for being outside. See, e.g., Matter of Richards, attached to the Complaint as Exhibit "B." "In determining whether an individual has a 'residence' the key objective is to ascertain 'the place which is the center of an individual's life, ... the locus of his primary concern' [citation omitted] and the place the individual presently intends to remain." Pitts v. Black, 608 F. Supp. 696, 709 (S.D.N.Y. 1984) (Residence of homeless persons for voting purposes). These are inherently factual matters that require some forum for fair resolution on a case by case basis when a school challenges a parent's declaration of residence. "The procedures by which the facts of the case are determined assume an importance fully as great as the substantive rule of law to be applied". Speiser v. Randall, 357 U.S. 513, 520-521 (1958). The defendants apparently have no formal procedure for handling residency disputes, and some applicants apparently are left out of school summarily by local school officials when they determine that they are not residents. As noted above, the New York Commissioner of Education offers an appeal procedure under Section 310 of the New York Education Law, analogous to a state court CPLR Article 78 proceeding on papers, but he does not hold hearings to determine contested fact issues. The procedural burden upon homeless people living in motel rooms to commence such proceedings is thus enormous and unfair. Under New York law, it is ordinarily the proponent of a change in residence who bears the burden of showing the change, and a residence once established is presumed to continue. Matter of Newcomb, 192 N.Y. 238, 250 (1908); Wilke v. Wilke, 73 A.D.2d 915, 916 (2d Dept. 1980); Bodfish v. Gallman, 50 A.D. 2d 457 (3d Dept. 1976); Matter of Callahan, 10 Ed. Dept. Rep. 66, 67 (1970). Accordingly, it is only fair, and should not be unduly burdensome, for local school officials who challenge a parent's declaration of residence to admit a pupil provisionally pending their initiation of some fair administrative proceeding for determination of the residence issue, one that provides at least the minimal protection of written notice and an impartial hearing. And, because the possibility of error is so great for homeless children,[4] whose precise residence may be difficult to ascertain,[5] there should be some means for the State Commissioner to resolve inter-district squabbles over a pupil's residence without sacrificing in the interim the child's entitlement to be educated. While the Court need not at this stage of the proceedings spell out in detail the exact nature of the process required, it is apparent that the minimal requirements of notice and a hearing were not adequately provided in this case, and that plaintiff is likely to prevail on the merits of her due process claim.[6]

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[1] N.Y. Education Law §3214.

[2] N.Y. Education Law §3214(5).

[3] N.Y. Education Law §4401.

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[4] "A New York state official noted that legislation to address the problem of educational access for the homeless has been pending for three years, and indicated that passage of such legislation would be 'a good start'. 'But,' she continued, 'our schools resent these children. We must look not only at educational concerns but at the social and economic causes for homelessness and our lack of response to these root causes. We focus on refugee camps in Lebanon, yet we have a generation of children growing up in our own version of internment camps [motels] in New York State.' Center for Law and Education Newsnotes, No. 38, p. 7 (September 1987).

[5] Compare, Matter of Richards, 25 Ed. Dept. Rep. 38 (N.Y. Commr. of Educ. 1985), with Delgado v. Freeport Public School District, 499 N.Y.S.2d 606 (N.Y. Sup. Ct. Nassau Co. 1986).

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[6] Plaintiff has also raised an equal protection claim, that under color of residence requirements, she has been denied an education on account of her status as a poor and homeless person. See, e.g., Male v. Crossroads, 469 F.2d 616 (2d Cir. 1972) (Irrational and invidious to discriminate against recipients of public assistance). Because the likely result of due process procedures would be a declaration by the State Commissioner that plaintiff is a resident of a school district, (Matter of Richards, 25 Ed. Dept. Rep. 38, attached to complaint), the equal protection issue need not be reached.

CONCLUSION

For all of the foregoing reasons, plaintiff respectfully prays that the Court grant her motion for a preliminary injunction, and such other and further relief as to the Court seems just and proper.

September 22, 1987

Respectfully submitted,

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Tel. (914) 949-1305

Attorneys for Plaintiff

By

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT COURT OF NEW YORK
****

SIXTA L. OROZCO
By her next friend
Margarita Arroyo,

Plaintiff,

COMPLAINT
87 Civ.

-against-

THOMAS SOBOL, Individually and
as Commissioner of the New York
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of the City School District of the City of
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and as Court Liaison Officer of the
City School District of the City of Yonkers.

Defendants.
****

INTRODUCTION

1. The infant plaintiff, by her mother and Next Friend, brings this action for declaratory and injunctive relief and damages pursuant to 42 U.S.C. {1983. The action arises from the defendants' denial of public education of the plaintiff who is "homeless" and living at a motel. Both the Mount Vernon Board of Education and the Yonkers Board of Education, by their agents and employees, have

denied a free public education, guaranteed to plaintiff under state law, without any written notice or an opportunity for a hearing. Plaintiff contends that the defendants' acts, omissions, practice, policy, custom or usage of denying education to homeless children without any written notice specifying the factual and legal grounds for the denial, without notice of any opportunity for review of the denial, and without notice to the child or the child's parent of the possible availability of assistance, including legal assistance, and without an opportunity for a hearing, violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution.

JURISDICTION

2. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. {1331 and 28 U.S.C. {1343(3) and 1343(4).

3. Plaintiffs' request for a declaratory judgment is authorized by 28 U.S.C. {{2201 and {2202.

PARTIES

4. Plaintiff Sixta L. Orozco is six years of age and she brings this action by her mother and Next Friend, Margarita Arroyo. Their present address is the Trade Winds Motel, 1141 Yonkers Avenue, Yonkers, Westchester County, New York.

5. Defendant Thomas Sobol is Commissioner of the New

York State Department of Education, and he maintains offices at the State Education Building, Albany, New York.

6. Defendant Mount Vernon Board of Education maintains offices at 165 N. Columbus Avenue, Mount Vernon, New York.

7. Defendant Dr. William Prattella is the Superintendent of Schools for the Mount Vernon School District, Mount Vernon, New York. He maintains an office at the Board of Education, 165 North Columbus Avenue, Mount Vernon, New York.

8. Defendant Joseph Williams is the Attendance Officer for the Mount Vernon School District, Mount Vernon, New York. He maintains an office at the Board of Education, 165 North Columbus Avenue, Mount Vernon, New York.

9. Defendant Yonkers Board of Education maintains offices at 145 Palmer Road, Yonkers, New York.

10. Defendant Dr. Donald Batista is the Superintendent of Schools for the Yonkers School District, Yonkers, New York. He maintains an office at the Board of Education, 145 Palmer Road, Yonkers, New York.

11. Defendant Jerry Frank is the Court Liaison Officer for the Yonkers School District, Yonkers, New York. He maintains an office at the Board of Education, 145 Palmer Road, Yonkers, New York.

FACTS

12. Plaintiff Sixta L. Orozco is a citizen of the United States and was born on November 29, 1980 in Puerto

Rico.

13. Sixta L. Orozco attended the First Grade of public school in San Lorenzo, Puerto Rico, until May, 1987.

14. On or about May 18, 1987, plaintiff travelled from Puerto Rico to the City of Mount Vernon with her mother, Margarita Arroyo.

15. Margarita Arroyo and plaintiff Sixta L. Orozco had previously lived in the City of Mount Vernon for several years. They stayed with friends in the City of Mount Vernon upon their arrival on or about May 18, 1987.

16. Margarita Arroyo applied for and received public assistance for her daughter and herself from the Westchester County Department of Social Services in the category of Aid to Families with Dependent Children. Her public assistance case was opened at the Mount Vernon District Office of the Westchester County Department of Social Services.

17. Margarita Arroyo has been unable to secure rental housing at a cost she can afford in the City of Mount Vernon, and she has been provided emergency assistance by the Westchester County Department of Social Services to stay temporarily at the Trade Winds Motel, 1141 Yonkers Avenue, Yonkers, New York.

18. The Trade Winds Motel is less than one mile from the border between the City of Yonkers and the City of Mount Vernon.

19. Margarita Arroyo presently intends to find permanent housing in the City of Mount Vernon, and Mount Vernon is the community in which she maintains most of her family and social ties.

20. In August of 1987, Margarita Arroyo went to the Mount Vernon Board of Education central offices to enroll her daughter Sixta in the second grade. She brought with her documentation from the Mount Vernon office of the Westchester County Department of Social Services, which indicated that she was "homeless". A copy of that letter, dated August 21, 1987, is attached hereto as Exhibit "A". Margarita Arroyo was advised by employees of the Mount Vernon Board of Education that she could register Sixta for the second grade at the Hamilton Elementary School in the City of Mount Vernon.

21. On September 9, 1987, Margarita Arroyo went to the Hamilton School in Mount Vernon to register Sixta for the Second Grade, but she was told by employees of the Mount Vernon Schools that she could not register Sixta for school because she lived at a motel in Yonkers. Margarita Arroyo returned to the Mount Vernon Board of Education central offices, and was told there that she should go to the Yonkers Board of Education.

22. Upon information and belief, the Mount Vernon Board of Education, or its employees having policy making authority, have a practice, policy, custom, or usage, when

they deny admission of an applicant to the public schools, not to provide written notices to the applicant and the applicant's parent of the following:

-Notice of the decision to deny admission.

-Notice of the factual basis for the decision.

-Notice of the legal grounds for the decision.

-Notice of any opportunity for a hearing or other review of the denial of admission, including a final decision by the Commissioner of Education pursuant to Section 310 of the New York Education Law.

-Notice of the possible availability of assistance from legal services organizations or other community organizations that might provide assistance to denied school applicants and their parents.

23. On or about September 10, 1987, and pursuant to the advice of employees of the Mount Vernon Board of Education, Margarita Arroyo went to the Yonkers Board of Education and attempted to enroll her daughter in the Yonkers public schools. An employee of the Yonkers Board of Education refused to enroll Sixta Orozco and said that she should attend school in Mount Vernon.

24. Upon information and belief, the Yonkers Board of Education, or its employees having policy making authority, have a practice, policy, custom, or usage, when they deny admission of an applicant to the public schools, not to provide written notices to the applicant and the

applicant's parent of the following:

-Notice of the decision to deny admission.

-Notice of the factual basis for the decision.

-Notice of the legal grounds for the decision.

-Notice of any opportunity for a hearing or other review of the denial, including a final decision by the Commissioner of Education pursuant to Section 310 of the New York Education Law.

-Notice of the possible availability of assistance from legal services organizations or other community organizations that might provide assistance to denied school applicants and their parents.

25. As a result of defendants' denial of school admission, Sixta Orozco is not attending school and is not receiving a free public education. She does not speak the English language, she is in need of education, and as a result of defendants' acts and omissions, she is wrongfully being deprived of the right to associate with teachers and with other pupils in the public schools. With each passing day she suffers damage and loss in an amount not yet ascertained.

26. A caseworker of the Westchester County Department of Social Services contacted defendants Williams and Frank on behalf of the plaintiff. Defendant Williams told the caseworker that Sixta belonged in Yonkers, and defendant Frank told the caseworker that plaintiff should go to the

Mount Vernon Schools. Neither Williams nor Frank provided any notice of any opportunity for a hearing to resolve the matter.

27. If defendants had provided adequate notice of their decisions and a meaningful opportunity for review by the State of Commissioner of Education, Margarita Arroyo could have presented witnesses, testimony, and documentary evidence to support the following factual and legal claims:

-That she had resided in the City of Mount Vernon previously and that she maintained contacts there.

-That she presently intends to reside in the City of Mount Vernon, and is staying at the Trade Winds Motel temporarily, and only because of her homelessness.

-That the motel accommodations are only temporary, of a transient nature, do not provide a home or homelike environment, and were not selected for the purpose of relocating to another community, but because no housing was then available in Mount Vernon, and because it was the closest available motel to Mount Vernon.

-That she has no present intent or desire to take up a new residence in Yonkers.

-That under similar circumstances, the New York Commissioner of Education has held that for school residency purposes, "[t]emporary absence does not constitute the establishment of residence in the district where the temporary abode is located or the abandonment of a permanent residence," and that "homeless" children in motels are entitled under Section 3202 of the New York Education Law to continue to attend their home district schools. Matter of Richards, 25 Ed. Dept. Rep. 38 (July 17, 1985). A copy of the Richards decision is attached to this complaint as Exhibit "B."

28. Defendant Thomas Sobol is Commissioner of Education of the State of New York, and is responsible for overseeing the implementation of New York State's program of free public education to which plaintiff is entitled under Article XI of the New York State Constitution and Section 3202 of the New York Education Law.

29. The Commissioner of Education has failed to establish a procedure for review of decisions by local school officials denying applicants requests for admission to the public schools, other than by formal appeal pursuant to Section 310 of the New York Education Law.

30. Because of the time it takes for the State Commissioner of Education to decide appeals under Section 310 of the New York Education Law, and because of the complexity of his rules of procedure, a Section 310 appeal does not provide a meaningful review at a meaningful time for the denied school applicant, who is typically unrepresented by counsel. The Commissioner of Education makes no provision in his rules for waiver of filing fees

for poor persons.

Irreparable Injury

31. As a result of defendants' actions, plaintiff has been deprived of her right to an education and the opportunity to learn and to interact with her peers in a school. While other children her age are attending school, she is becoming depressed, despondent, and stigmatized because of her exclusion. Unless the request for preliminary injunctive relief is granted, directing defendant Mount Vernon Public Schools to enroll Sixta forthwith, the plaintiff will continue to suffer irreparable harm, educational loss and other damage without a meaningful hearing on her claim of entitlement to attend public school.

COUNT I

32. Plaintiff repeats and reavers each of the allegations of paragraphs 1 through 31.

33. Plaintiff Sixta L. Orozco has a legitimate claim of entitlement under state law to a free public education, under Section 3202 of the New York Education Law and Article XI of the New York State Constitution.

34. The defendants' denial of education was without adequate, written notice of the denial and without a meaningful opportunity for a hearing before an impartial decisionmaker, and was in violation of property and liberty rights guaranteed to the plaintiff under the Due Process

Clause of the Fourteenth Amendment to the United States Constitution. Plaintiff is therefore entitled to an award of declaratory and injunctive relief and nominal damages pursuant to 42 U.S.C. {1983.

35. By reason of defendants' violation of her right to procedural due process of law, plaintiff has suffered and continues to suffer injury and damage in an amount not yet ascertained, and defendants are liable for compensatory damages in an amount not yet ascertainable.

36. Defendants knew or should have known when they denied admission to the plaintiffr that "plaintiff was entitled to written notice of the school system's decision, including a statement of reasons and of available administrative remedies." Takeall v. Ambach, 609 F. Supp. 81 (S.D.N.Y. 1985) (Gagliardi, J.)., and they are liable for punitive damages pursuant to 42 U.S.C. {1983.

COUNT II

37. Upon information and belief, plaintiff was denied admission to the Mount Vernon Public Schools and to the Yonkers Public Schools because of her status as an indigent, "homeless" child living in a motel at the expense of the Westchester County Department of Social Services, under color of Section 3202 of the New York Education Law.

38. The defendants' discrimination against plaintiff on account of her poverty and her homelessness is irrational, invidious, and in violation of plaintiff's

right to equal protection of the laws, guaranteed to her by the Fourteenth Amendment to the United States Constitution.

39. By reason of the denial by defendants of plaintiff's right to equal protection of the laws, plaintiff is entitled to declaratory and injunctive relief and an award of damages in an amount not yet ascertained.

COUNT III

40. Plaintiff repeats and reavers each of the allegations of paragraphs 1 through 39.

41. Plaintiff is a resident of the Mount Vernon School District for purposes of Section {3202 of the New York Education Law, and is entitled to attend the Mount Vernon Public Schools.

42. Alternatively, plaintiff is a resident of the Yonkers School District, and is entitled to attend the Yonkers Public Schools.

43. Defendant Thomas Sobol has failed or refused to provide a meaningful opportunity for homeless school applicants to contest a denial of admission by a local school board at a hearing and to receive a decision by an impartial decisionmaker.

44. The procedure adopted by the Commissioner of Education for appeals pursuant to Section 310 of the New York Education law is not adequate or fair for the denied homeless school applicant because it does not offer timely relief for a pupil out of school, there is no provision in

the Commissioner's rules for waiver of a filing fee for poor persons, there is no procedure for an oral hearing, there is no simplified pleading or service of process allowed in his rules, and the Commissioner provides no forms or assistance to homeless, pro se claimants seeking to review the denial by local school officials of a request for enrollment.

45. By reason of the failure of the Commissioner of Education to establish a meaningful opportunity to review local school officials' denials of admission, to homeless children, plaintiff was denied due process and equal protection of law.

46. Defendant Sobol knew or reasonably should have known that his rules and procedures fail to provide homeless children in New York State and their parents a meaningful hearing and timely decision after a hearing on their exclusion from the public schools.

46. Plaintiffs is entitled to an award of declaratory and injunctive relief and damages against the defendant Commissioner of Education, pursuant to 42 U.S.C. {1983.

RELIEF

WHEREFORE, Plaintiff respectfully prays that this Court:

A. Assume jurisdiction over this action pursuant to 28 U.S.C. 1331 and 1343.

B. Enter a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure, directing defendants Mount Vernon Board of Education, Prattella, and Williams forthwith to admit plaintiff Sixta Orozco to the Mount Vernon Schools and directing Defendant Commissioner Sobol to provide an opportunity for a hearing and a decision on the question of plaintiff's residence for school purposes, pending a final decision in this case;

C. Enter a declaratory judgment pursuant to 28 U.S.C.{2201

that the policy or practice of defendants to cause or to permit the exclusion of "homeless" children from public school without adequate written notice and without notice of a meaningful opportunity for a hearing, was in violation of plaintiff's rights to procedural due process of law and equal protection of the law, guaranteed to her by the Fourteenth Amendment to the United States Constitution;

D. Enter a permanent injunction enjoining defendants from denying school admission to plaintiff without providing adequate written notice and an opportunity for a prompt hearing and decision, and enjoining defendants from acting under color of Section 3202 of the New York Education Law to deny school admission to plaintiff on the ground of her homelessness.

E. Award plaintiff nominal damages, plus such compensatory damages as shall be shown at trial, plus punitive damages in an amount to be determined by the Court, pursuant to 42 U.S.C. {1983.

F. Award such other and further relief as this Court may deem just and proper, together with the costs, including reasonable attorneys' fees pursuant to 42 U.S.C. {1988.

Dated: September 19, 1987

Respectfully Submitted,

WESTCHESTER LEGAL SERVICES, INC.
Gerald A. Norlander, Esq.,
Julie A. Mills, Esq.,
Of Counsel
150 Grand Street
White Plains, New York 10601
Tel. (914) 949-1305

Attorneys for Plaintiff

By ______________________________
GERALD A. NORLANDER, ESQ.

ExT 336

Westchester County

08/21/87

965559

Hamilton School
Mt. Vernon, NY

Dear Sir,

ANDREW P. O'ROURKE
County Executive

JOHN J. ALLEN
Commissioner

Department of Social Services

DISTRICT OFFICES

100 East First Street
Mt. Vernon, N.Y. 10550-3414
Tel: 664-4224

25 Moore Avenue
Mt. Kisco, N.Y. 10549-3195
Tel: 241-3900

420 North Avenue
New Rochelle, N.Y. 10801-3497
Tel: 633-1200

2 Church Street
Ossining, N.Y. 10562-4891
Tel: 762-3324

750 Washington Street
Peekskill, N.Y. 10566-5499
Tel: 739-6500

111 South Ridge Street
Port Chester, N.Y. 10573-2812
Tel: 937-1100

85 Court Street
White Plains, N.Y. 10601-5103
Tel: 285-5844

30 South Broadway
Yonkers, N.Y. 10701-3704
Tel: 964-6000

This is to verify that Margarita Arroyo and her daughter Sixta L. Orozco (date of birth 11/29/80) are currently clients of the Mt. Vernon Dept. of Social Services.

They are homeless and staying at the Tradewinds Hotel, Yonkers, NY until they can find permanent housing in Mt. Vernon.

Mrs. Arroyo states that Sixta L. Orozco was in the 1st grade in San Lorenzo Puerto Rico in 1986-87.

You may call this office (664-4224 x 340) if you have any questions.

Very truly,

WT for Paul Burge
W. Talib/For P. Burge
Caseworker

F. Troxel
Supervisor

EXHIBIT "A" 330

tion, treaties, or laws of the U.S. Whether a claim "arises under" federal law is governed by whether the plaintiff's "well-pleaded complaint" raises federal issues. In this case, the complaint raises only claims provided by state law. The insurer claims federal question jurisdiction based upon ERISA's having preempted the state law. As federal preemption is normally a defense, it does not appear in a well-pleaded complaint, so the usual rule would indicate that federal subject matter jurisdiction is lacking.

Taylor, however, holds that the special rule for claims preempted by §301 of the Labor Management Relations Act should also be applied to cases covered by ERISA's civil enforcement provisions. As a result, ERISA preemption does not act as a defense to a state law claim, which is the usual effect of federal preemption; instead, it converts the related claim into a federal question. Therefore, federal question jurisdiction is present and removal was proper.—Hill, J.

—CA 11; Belasco v. W.K.P. Wilson & Sons Inc., No. 86-7088, 12/2/87.

Schools and Colleges

PUBLIC SCHOOLS—

Child who resides in shelter for homeless persons, thus lacking permanent residence in any school district, has shown irreparable harm, balance of hardships tipping in her favor, and sufficiently serious questions going to merits of her claim that state-created right to free public education cannot be deprived without due process to warrant preliminary injunctive relief directing enrollment in school district in which shelter is situated.

A mother and her seven-year-old child left Puerto Rico several years ago and lived for a period of time in Mount Vernon, N.Y. They returned to Puerto Rico and the child attended first grade there. In May 1987, the mother and daughter returned to New York, spending the night of their arrival in Mount Vernon. The following day, the mother applied for public assistance with the Westchester County Department of Social Services. The case was accepted and social services provided the family with emergency housing at a motel in Yonkers.

The mother hopes to find permanent residence in Mount Vernon. Consequently, she sought to enroll her daughter in that school system. She was told, however, that the child could not be registered there since the family resided in Yonkers. Then Yonkers school officials told the mother that because they did not permanently reside in Yonkers, the child could not be enrolled in that school system. The mother filed a complaint under 42 USC 1983, alleging a violation of the Fourteenth Amendment's Due Process Clause. This court granted a temporary restraining order directing that the child immediately be registered in the Yonkers school system. This court now considers the request for a preliminary injunction.

The standards for injunctive relief in this circuit are well established. A plaintiff must show irreparable harm and either (1) a likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardship tipping decidedly toward the party requesting the preliminary relief. There can be no doubt that the child could suffer irreparable harm if she is denied attendance at a public school. It is in satisfying the second prong that the child seeks to send this court into uncharted and potentially hostile waters.

The New York Constitution expressly directs that the children of the state shall be provided with a free public education. Although there is considerable debate as to what constitutes the child's legal residence, there can be no doubt that she actually resides in New York. As such, she is entitled to a free public education, a property right that cannot be abridged without her first being accorded due process.

Having determined that the child is entitled to due process protection, this court is left with the more difficult questions of how much process is due and who must provide it. The child argues that the local school districts must provide her with a hearing and notice of their decision, including identification of appellate rights, pursuant to Goss v. Lopez, 419 U.S. 565 (1975). In Goss, the U.S. Supreme Court held that where disciplinary action will result in a student's suspension from school, the student is entitled to the minimum due process protections of notice and hearing. Here, certainly, if the child had been enrolled in the system, her removal would trigger, at a minimum, Goss-like protection. Such is not the case. The child has sought admission to a school, but has not yet been admitted.

The child does not have an unfettered right to a tuition-free education at any public school in New York. Her right is limited by a residency requirement embodied in the New York education law. The question therefore is what type of hearing should be conducted, and by whom, in settling an inter-district dispute over establishing the child's residency.

Mount Vernon points out that the child and her mother have not resided in that town for some years and that a one night stopover on return from Puerto Rico can scarcely premise any obligation on its part. Yonkers argues that the child and her mother are physically within its bounds through the choice of social services and that they do not intend to remain there. The child's purported remedy to the situation, a hearing and written notice requirement, is in fact no solution at all. There do not appear to be any disputed facts requiring a hearing. The positions of the school districts are well known and putting them in writing accomplishes little. The simple remedy is a directive or ruling from the Commissioner of Education settling the inter-district dispute. But neither the state legislature nor the state Department of Education has provided any guidelines to aid school districts in settling such disputes.

This court is keenly aware of the thorny policy choices this case and others like it present. Although this court cannot and need not say with certainty at this stage that a hearing is constitutionally mandated, these are certainly sufficiently serious questions going to the merits and the hardships tip so very decidedly in the child's favor that preliminary injunctive relief against one of the school districts is warranted. At this stage, however, without the benefit of a full hearing on the merits, this court declines to direct a local school district to provide the child with notice and hearing on the residency question.

In the interim, until the merits are reached, a preliminary determination permitting the child to attend school must be made. Traditional legal concepts used to establish legal domicile are unavailing since, whatever the family's intent, social services largely will control the locus of their residence. This court believes therefore that the social service placement should operate presumptively as to the child's legal residence. Accordingly, this court grants a preliminary injunction against the Yonkers school district.—Goettel, J.

—USDC SNY; Orozco v. Sobol, No. 87 Civ. 6822 (GLG), 11/30/87.

Ships and Shipping

DAMAGES—

Seaman's damages in maritime personal injury action are fully recoverable from each joint tortfeasor, regardless of tortfeasors' proportional degree of fault, less amount recovered from settling tortfeasors.

This Jones Act and general maritime law action arose out a collision in which a ship struck a dredge and barge. The widow of a seaman who served on the barge challenges the district court's application of the apportionment principles set out in Leger v. Drilling Well Control Inc., 592 F2d 1246 (CA5 1979), to the award of damages. Because the court determined that the employer (barge owner) was 30 percent responsible for the accident, and because the widow had settled with the shipowner (who was found to be 70 percent responsible), the court awarded the widow only 30 percent of the total damages. The shipowner had paid the widow $315,000 and taken a release. The district court thought Leger required this result, under which the widow received $513,406.20, or $147,948.80 less than the total damages of $661,354.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT COURT OF NEW YORK
****

SIXTA L. OROZCO
By her next friend
Margarita Arroyo, -

Plaintiff,

-against- 87 Civ. 6822
(GLG)

THOMAS SOBOL, Individually and
as Commissioner of the New York
State Department of Education; and

MOUNT VERNON BOARD OF EDUCATION; and
DR. WILLIAM C. PRATTELLA, Individually
and as Superintendent of Schools for
the City School District of the
City of Mount Vernon; and
JOSEPH WILLIAMS, Individually and as
Attendance Officer of the City School
District of the City of Mount Vernon; and

YONKERS BOARD OF EDUCATION, DR. DONALD
BATISTA, Individually and as Superintendent
of the City School District of the City of
Yonkers; and JERRY FRANK, Individually
and as Court Liaison Officer of the
City School District of the City of Yonkers.

Defendants.
****

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTIONS TO DISMISS

RECEIVED
JUL 1 1989
NATIONAL CLEARINGHOUSE
FOR LEGAL SERVICES

WESTCHESTER LEGAL SERVICES, INC.
Gerald A. Norlander, Esq.
Julie A. Mills, Esq.
150 Grand Street
White Plains, New York, 10601
Tel.: (914) 949-1305

Attorneys for Plaintiff

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Preliminary Statement

Sixta Orozco, by her mother and Next Friend, Margarita Arroyo, brought this action pursuant to 42 U.S.C. §1983 against the defendant school boards and school officials, seeking a declaratory judgment, injunctive relief, and damages arising from the denial of her application for admission to the public schools. The Plaintiff contends that she was denied admission to the first grade as a nonresident, without any written notice and without any opportunity for a hearing, at which she could establish her residence, in violation of her right to due process of law.

The Yonkers defendants[1] have moved to dismiss the action as against them, contending that it is moot. The Mount Vernon defendants[2] join in that motion.[3] The defendant Commissioner of the New York State Department of Education also has moved to dismiss, on mootness and numerous other grounds: non-justiciability, immunity, lack of jurisdiction, failure to state a claim upon which relief can be granted, and improper venue.

Plaintiff maintains that her damage claims are viable, and that there is still a live case or controversy regarding her claims for declaratory and prospective injunctive relief, to prevent any recurrence of the deprivation she suffered as a result of defendants' constitutionally inadequate procedures for resolving public school residency disputes. While the regulations proposed by the defendant State Commissioner partially address plaintiff's claims for prospective relief, they do not provide the hearing opportunity plaintiff seeks. Plaintiff respectfully submits this Memorandum in opposition to the motions of the defendants.

---

[1] The "Yonkers defendants" are the Yonkers Board of Education, its Superintendent of Schools, Dr. Donald Batista, and its Court Liaison Officer, Jerry Frank.

[2] The "Mount Vernon defendants" are the Mount Vernon Board of Education, its Superintendent of Schools, Dr. William C. Prattella, and its Attendance Officer, Joseph Williams.

[3] See Affidavit of Vincent P. D'Andrea, Esq., Attorney for Mount Vernon defendants, dated April 19, 1988.

PROVISIONS OF STATE LAW INVOLVED

Article XI of the New York Constitution provides as follows, in pertinent part:

> "The legislature shall provide for the maintenance and support of a system of free, common schools, wherein all the children of this state may be educated."

N.Y. Const. Art. XI, Sec. 1.

Section 3202 of the New York Education Law provides as follows, in pertinent part:

> "A person over five and under twenty-one years of age who has not received a high school diploma is entitled to attend the public schools maintained in the district in which such person resides without the payment of tuition.

N.Y. Education Law, (3202.

Section 310 of the New York Education Law provides as follows:

> "Any party conceiving himself aggrieved may appeal by petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article. The petition may be made in consequence of any action:
>
> * * * *
>
> 7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools.

N.Y. Education Law, §310.

Part 275 of the Regulations of the Commissioner of the New York State Department of Education, Parties and Pleadings, provides as follows:

PART 275

PARTIES AND PLEADINGS

(Statutory authority: Education Law, § 207, 311)

Sec.
275.1 Parties
275.2 Class appeals
275.3 Pleadings
275.4 Names of parties or attorneys to be endorsed on all appeals
275.5 Verification
275.6 Affidavit of verification
275.7 Oaths
275.8 Service of pleadings and supporting papers
275.9 Filing and fee

Sec.
275.10 Contents of petition
275.11 Notice with petition
275.12 Contents of answer
275.13 Service of answer and supporting papers
275.14 Reply
275.15 Representation by attorney
275.16 Limitation of time for initiation of appeal
275.17 *Amicus curiae*

Historical Note

Part repealed, new (§§ 275.1-275.17) filed Aug. 6, 1969 eff. Nov. 1, 1969.

Section 275.1 Parties. The party commencing an appeal shall be known as petitioner or appellant and any adverse party, as respondent. After an appeal is commenced in accordance with these rules, no party shall be joined or be permitted to intervene, except by leave or direction of the Commissioner of Education.

Historical Note

Sec. repealed, new filed Aug. 6, 1969 eff. Nov. 1, 1969.

275.2 Class appeals. (a) When allowed, an appeal may be maintained by one or more individuals on their own behalf and as representatives of a class of named or unnamed individuals only where the class is so numerous that joinder of all members is impracticable and where all questions of fact and law are common to all members of the class. Minor variations of fact shall not preclude the maintenance of a class appeal when such variations are irrelevant for purposes of the decision.

(b) *Protective orders.* The commissioner may at any stage of the appeal issue such orders as may be necessary to fairly and adequately protect the interests of the persons on whose behalf the appeal is brought.

Historical Note

Sec. repealed, new filed Aug. 6, 1969 eff. Nov. 1, 1969.

275.3 Pleadings. (a) *Types of pleadings.* There shall be a petition, an answer, and, if new material is alleged in the answer, a reply thereto. No other pleading will be permitted, except as provided in subdivision (b) of this section.

(b) *Additional pleadings.* The commissioner may permit or require the service and filing of additional pleadings upon such terms and conditions as he may specify. An additional pleading may be served upon all other parties and filed with the office of counsel only with the prior permission of the commissioner, granted upon application of the party desiring to submit such pleading. The proposed pleading shall accompany such application, and both the application and the proposed pleading shall be served upon all other parties in accordance with subdivision (b) of section 275.8 of this Part.

(c) *Form of pleadings.* All pleadings and affidavits shall be submitted in typewritten form, double spaced, on white paper 8½ by 11 inches in size, and shall set forth the allegations of the parties in numbered paragraphs. Such pleadings shall be addressed "To the Commissioner of Education", and shall be filed in accordance with the provisions of section 275.9 of this Part.

Historical Note

Sec. repealed, new filed: Aug. 6, 1969; Oct. 28, 1974; June 23, 1980 eff. Sept. 1, 1980.

275.4 Names of parties or attorneys to be endorsed on all papers. All pleadings and papers submitted to the commissioner in connection with an appeal must be endorsed with the name, post office address and telephone number of the party submitting the same, or, if a party is represented by counsel, with the name, post office address and telephone number of his attorney.

Historical Note

Sec. filed Aug. 6, 1969 eff. Nov. 1, 1969.

275.5 Verification. All pleadings shall be verified. The petition shall be verified by the oath of at least one of the petitioners, except that when the appeal is taken by the trustee or the board of trustees or board of education of a school district, it shall be verified by any person who is familiar with the facts underlying the appeal, pursuant to a resolution of such board authorizing the commencement of such appeal on behalf of such trustees or board. An answer shall be verified by the oath of the respondent submitting such answer, except that when the respondent is a domestic corporation, the verification shall be made by an officer thereof. If the appeal is brought from the action of the trustee or board of trustees or board of education of a school district, verification of the answer shall be made by any person who is familiar with the facts underlying the appeal. If two or more respondents are united in interest, verification of the answer shall be made by at least one of them who is familiar with the facts. A reply shall be verified in the manner set forth for the verification of an answer.

Historical Note

Sec. filed Aug. 6, 1969; amds. filed: Oct. 28, 1974; July 29, 1983 eff. Sept. 1, 1983.

275.6 Affidavit of verification. The affidavit of verification shall be in the following form:

STATE OF NEW YORK
COUNTY OF__________ ss.:

____________________ being duly sworn, deposes and says that he is __________ __________ in this proceeding; that he has read the annexed ____________________ and knows the contents thereof; that the same is true to the knowledge of deponent except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

____
(Signature)

Subscribed and sworn to before
me this ______ day of __________
19____

____
(Signature and title of officer)

Historical Note

Sec. filed Aug. 6, 1969 eff. Nov. 1, 1969.

275.7 Oaths. All oaths required by these rules may be taken before any person authorized to administer oaths within the State of New York. The statement of an attorney admitted to practice in the courts of this State and appearing in an appeal as attorney of record or of counsel to the attorney of record, when subscribed and affirmed by him to be true under the penalty of perjury, may be served or filed in the appeal in lieu of and with the same force and effect as an affidavit.

Historical Note

Sec. filed Aug. 6, 1969 eff. Nov. 1, 1969.

275.8 Service of pleadings and supporting papers. (a) *Petition.* A copy of the petition, together with all of petitioner's affidavits, exhibits, and other supporting papers, except a memorandum of law or affidavit in support of a reply, shall be personally served upon each named respondent, or, if he cannot be found upon diligent search, by delivering and leaving the same at his residence with some person of suitable age and discretion, between six o'clock in the morning and nine o'clock in the evening, or as otherwise directed by the commissioner. If a school district is named as a party respondent, service upon such school district shall be made personally by delivering a copy of the petition to the district clerk, to any trustee or any member of the board of education of such school district, to the superintendent of schools, or to a person in the office of the superintendent who has been designated by the board of education to accept service. If a board of cooperative educational services is named as a party respondent, service upon such board shall be made personally by delivering a copy of the petition to the district superintendent, to a person in the office of the district superintendent who has been designated by the board to accept service, or to any member of the board of cooperative educational services. Pleadings may be served by any person not a party to the appeal over the age of 18 years.

(b) *Subsequent pleadings and papers.* All subsequent pleadings and papers shall be served upon the adverse party or, if the adverse party is represented by counsel, upon his attorney. When the same attorney appears for two or more parties, only one copy need be served upon him. Service of all pleadings subsequent to the petition shall be made by mail or by personal service. Service by mail shall be complete upon deposit of the paper enclosed in a postpaid properly addressed wrapper, in a post office or official depository under the exclusive care and custody of the United States Postal Service within the state. If the last day for service of any pleading or paper subsequent to the petition falls on a Saturday or Sunday, service may be made on the following Monday; and if the last day for such service falls on a legal holiday, service may be made on the following business day.

(c) *Award of bid.* If an appeal involves the award of a contract pursuant to article 5-A of the General Municipal Law or pursuant to subdivision 14 of section 305 of the Education Law, and a party other than the appellant has been designated as the successful bidder or has been awarded a contract, such successful bidder must be joined as a respondent and must be served with a copy of the petition. In such case, the respondent board of education or board of trustees shall forward to the commissioner, within 20 days after service of the petition on appeal, a copy of the notice to bidders together with proof of publication thereof, a copy of the specifications and copies of all bids or proposals.

(d) *Disputed elections.* If an appeal involves the validity of a school district meeting or election, or the eligibility of a district officer, a copy of the petition must be served upon the trustee or board of trustees or board of education as the case may be, and upon each person whose right to hold office is disputed and such person must be joined as a respondent. In such case, except where the eligibility of a district officer is involved, any qualified voter may serve and file an answer in such appeal whether or not the trustee or board of trustees or board of education serves and files an answer therein.

Historical Note

Sec. filed Aug. 6, 1969; amds. filed: Oct. 28, 1974; Feb. 29, 1980; June 23, 1980; July 29, 1983 eff. Sept. 1, 1983. Amended (a) and (b).

275.9 Filing and fee. (a) Within five days after the service of any pleading or paper, the original, together with the affidavit of verification and an affidavit proving the service of a copy thereof, shall be transmitted to the Office of Counsel, New York State

Education Department, State Education Building, Albany, N.Y. 12234. The affidavit of service shall be in the form set forth below and shall indicate the name and official character of the person upon whom service was made.

FORM FOR AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK

COUNTY OF________ ss.:

______________________ being duly sworn, deposes and says that he is over the age of eighteen years and is not a party in this proceeding; that on the ______ day of ________, 19____, at No. ______ ________________ Street, in the town of ________________, county of ________________, State of New York, he served the annexed ________________ on ________________ by delivering to and leaving with said ____________________________ at said time and place a true copy thereof.

Deponent further says he knew the person so served to be the said ________________, who is ________________ in said district.

____
(Signature)

Subscribed and sworn to before
me this ______ day of ________, 19____.

____
(Signature and title of officer)

FORM FOR AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK

COUNTY OF__________ ss.:

______________________ being duly sworn, deposes and says that he is over the age of eighteen years and is not a party in this proceeding; that on the ________ day of ________________, 19____ deponent served the within ________________ upon ________________ in this action, at ________________ the addresses designated by ________________ for that purpose, by depositing a true copy of the same by mail, enclosed in a post paid properly addressed wrapper, in ________ a post office ________ official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

____
(Signature)

Subscribed and sworn to before
me this ____ day of ________, 19____

____
(Signature and title of officer)

(b) *Filing fee.* A fee of $20, payable to the State Education Department, shall accompany the filing of a petition in an appeal to the Commissioner of Education except that there shall be no fee for the filing of a petition pursuant to Education Law, section 4404(2).

Historical Note

Sec. filed Aug. 6, 1969; amds. filed: Oct. 28, 1974; May 23, 1983 as emergency measure, eff. for 60 days; made permanent by order filed July 29, 1983; Sept. 25, 1984 as emergency measure eff. Sept. 25, 1984. Amended (b).

275.10 Contents of petition. The petition shall contain a clear and concise statement of the petitioner's claim showing that the petitioner is entitled to relief, and shall further contain a demand for the relief to which the petitioner deems himself entitled. Such statement must be sufficiently clear to advise the respondent of the nature of petitioner's claim and of the specific act or acts complained of.

Historical Note

Sec. filed Aug. 6, 1969 eff. Nov. 1, 1969.

275.11 Notice with petition. Each petition must contain the following notice:

> Notice:
>
> You are hereby required to appear in this appeal and to answer the allegations contained in the petition. Your answer must conform with the provisions of the regulations of the Commissioner of Education relating to appeals before the Commissioner of Education, copies of which are available from the Office of Counsel, New York State Education Department, State Education Building, Albany, N.Y. 12234.

If an answer is not served and filed in accordance with the provisions of such rules, the statements contained in the petition will be deemed to be true statements, and a decision will be rendered thereon by the commissioner.

Please take notice that such rules require that an answer to the petition must be served upon the petitioner, or if he be represented by counsel, upon his counsel, within 20 days after the service of the appeal, and that a copy of such answer must, within five days after such service, be filed with the Office of Counsel, New York State Education Department, State Education Building, Albany, N.Y. 12234.

Historical Note

Sec. filed Aug. 6, 1969; amd. filed Oct. 28, 1974 eff. Jan. 1, 1975.

275.12 Contents of answer. The answer of each respondent shall contain a clear and concise statement of his defenses to each claim and shall either admit or deny the allegations of the petition. In addition, each respondent may set forth affirmative defenses or defenses by way of avoidance. If more than one respondent has been named and served and if common questions of law or fact are involved, the respondents, if otherwise united in interest, may submit a joint answer to the petition.

Historical Note

Sec. filed Aug. 6, 1969 eff. Nov. 1, 1969.

275.13 Service of answer and supporting papers. Each respondent upon whom a copy of the petition has been served shall, within 20 days from the time of such service, answer the same, either by concurring in a statement of facts with the petitioner or by service in the manner set forth in section 275.8 of this Part of an answer, together with all of respondent's affidavits, exhibits and other supporting papers, except a memorandum of law. The date upon which personal service was made upon respondent shall be excluded in the computation of the 20-day period.

Historical Note

Sec. filed Aug. 6, 1969; amd. filed July 29, 1983 eff. Sept. 1, 1983.

275.14 Reply. The petitioner shall reply to each affirmative defense contained in an answer. The reply, together with any affidavits which shall be limited to support of such reply, shall be served within 10 days after service of the answer to which it responds in the manner set forth in section 275.8(b) of this Part. If the answer has been served by mail upon petitioner or his counsel, the date of mailing and the four days subsequent thereto shall be excluded in computing the 10-day period.

Historical Note

Sec. filed Aug. 6, 1969; amd. filed July 29, 1983 eff. Sept. 1, 1983.

275.15 Representation by attorney. A party other than a school district or a corporation may prosecute or defend an appeal before the commissioner in person or by an attorney. A school district or a corporate party may appear only by an attorney.

Historical Note

Sec. filed Aug. 6, 1969 eff. Nov. 1, 1969.

275.16 Limitation of time for initiation of appeal. An appeal to the commissioner must be instituted within 30 days from the making of the decision or the performance of the act complained of. The commissioner, in his sole discretion, may excuse a failure to commence an appeal within the time specified for good cause shown. The reasons for such failure shall be set forth in the petition.

Historical Note

Sec. filed Aug. 6, 1969 eff. Nov. 1, 1969.

Regulations of the Commissioner of Education, Parties and Pleadings, 8 NYCRR Part 275, continued.

275.17 Amicus curiae. The commissioner may, in his sole discretion and upon written application submitted at or before oral argument, permit interested persons or organizations to submit memoranda of law *amicus curiae* in connection with a pending appeal. Those permitted to submit memoranda *amicus curiae* shall not be considered parties to the appeal before the commissioner and shall not be entitled to receive copies of pleadings and papers pertaining thereto or to participate in oral argument.

Historical Note

Sec. filed Aug. 6, 1968 eff. Nov. 1, 1968.

Part 276 of the Regulations of the Commissioner of Education, Rules of Practice, provides as follows:

PART 276

RULES OF PRACTICE

(Statutory authority: Education Law, § 311)

Sec.
276.1 Stay of proceedings
276.2 Oral argument
276.3 Extensions of time to answer or reply
276.4 Memoranda of law
Sec.
276.5 Records and reports
276.6 Decisions to be filed
276.7 Reopening of a prior decision
276.8 Dismissal of appeal

Historical Note

Part repealed, new (§§ 276.1-276.9) filed Aug. 6, 1969 eff. Nov. 1, 1969.

Section 276.1 Stay of proceedings. (a) The initiation of an appeal shall not, in and of itself, affect a stay of any proceedings on the part of any respondent. If the petitioner desires a stay, he shall make application therefor by a duly verified petition, stating the *facts* and the law upon which such stay should be granted. Affidavits in opposition to an application for a stay order may be submitted by any party opposing such application. Such affidavits shall be served on all other parties and filed with the office of counsel within three business days after service of the petition, unless the commissioner shall provide otherwise. The commissioner may, in his discretion, with or without application therefor, grant a stay if in his judgment the issuance of such a stay is necessary to protect the interests of the parties, or any of them, pending an ultimate determination of the appeal.

(b) A petition which contains a request for a stay shall contain the following notice in addition to that otherwise required by this Chapter:

> Please take further notice that the within petition contains an application for a stay order. Affidavits in opposition to the application for a stay must be served on all other parties and filed with the Office of Counsel within three business days after service of the petition.

Historical Note

Sec. repealed, new filed Aug. 6, 1969; amds. filed: June 23, 1980; July 29, 1983 eff. Sept. 1, 1983.

276.2 Oral argument. (a) If a petitioner desires an opportunity for oral argument before the commissioner, a request therefor must be clearly set forth in the petition. If no such request is made, the respondent or, if there be more than one, a respondent, may request oral argument at any time prior to or with the service of an answer. If a petitioner has failed to request oral argument, but respondent has made a timely request, petitioner may, within two weeks from receipt of respondent's request, request oral argument on his own behalf.

(b) The commissioner may, in his sole discretion, determine whether oral argument shall be had.

(c) Argument on appeals to the commissioner may be heard before the commissioner, the acting commissioner or the counsel.

(d) All evidentiary material shall be presented by affidavit or by exhibits. No testimony is taken and no transcript of oral argument will be made.

(e) *Adjournment of the date of oral argument.* Once an appeal has been scheduled for oral argument on a particular date by the office of counsel and due notification has been given to the respective parties or their attorneys, no adjournments of that date will be granted by the commissioner unless timely application is made therefor, upon notice to all parties. Such application shall be in writing, addressed to the office of counsel, must be postmarked not later than 10 days prior to the date on which oral argument is

275.17 Amicus curiae. The commissioner may, in his sole discretion and upon written application submitted at or before oral argument, permit interested persons or organizations to submit memoranda of law *amicus curiae* in connection with a pending appeal. Those permitted to submit memoranda *amicus curiae* shall not be considered parties to the appeal before the commissioner and shall not be entitled to receive copies of pleadings and papers pertaining thereto or to participate in oral argument.

Historical Note

Sec. filed Aug. 6, 1969 eff. Nov. 1, 1969.

x

Part 276 of the Regulations of the Commissioner of Education, Rules of Practice, provides as follows:

PART 276

RULES OF PRACTICE

(Statutory authority: Education Law, § 311)

Sec.
276.1 Stay of proceedings
276.2 Oral argument
276.3 Extensions of time to answer or reply
276.4 Memoranda of law

Sec.
276.5 Records and reports
276.6 Decisions to be filed
276.7 Reopening of a prior decision
276.8 Dismissal of appeal

Historical Note

Part repealed, new (§§ 276.1-276.9) filed Aug. 6, 1969 eff. Nov. 1, 1969.

Section 276.1 Stay of proceedings. (a) The initiation of an appeal shall not, in and of itself, effect a stay of any proceedings on the part of any respondent. If the petitioner desires a stay, he shall make application therefor by a duly verified petition, stating the facts and the law upon which such stay should be granted. Affidavits in opposition to an application for a stay order may be submitted by any party opposing such application. Such affidavits shall be served on all other parties and filed with the office of counsel within three business days after service of the petition, unless the commissioner shall provide otherwise. The commissioner may, in his discretion, with or without application therefor, grant a stay if in his judgment the issuance of such a stay is necessary to protect the interests of the parties, or any of them, pending an ultimate determination of the appeal.

(b) A petition which contains a request for a stay shall contain the following notice in addition to that otherwise required by this Chapter:

> Please take further notice that the within petition contains an application for a stay order. Affidavits in opposition to the application for a stay must be served on all other parties and filed with the Office of Counsel within three business days after service of the petition.

Historical Note

Sec. repealed, new filed Aug. 6, 1969; amds. filed: June 23, 1980; July 29, 1983 eff. Sept. 1, 1983.

276.2 Oral argument. (a) If a petitioner desires an opportunity for oral argument before the commissioner, a request therefor must be clearly set forth in the petition. If no such request is made, the respondent or, if there be more than one, a respondent, may request oral argument at any time prior to or with the service of an answer. If a petitioner has failed to request oral argument, but respondent has made a timely request, petitioner may, within two weeks from receipt of respondent's request, request oral argument on his own behalf.

(b) The commissioner may, in his sole discretion, determine whether oral argument shall be had.

(c) Argument on appeals to the commissioner may be heard before the commissioner, the acting commissioner or the counsel.

(d) All evidentiary material shall be presented by affidavit or by exhibits. No testimony is taken and no transcript of oral argument will be made.

(e) *Adjournment of the date of oral argument.* Once an appeal has been scheduled for oral argument on a particular date by the office of counsel and due notification has been given to the respective parties or their attorneys, no adjournments of that date will be granted by the commissioner unless timely application is made therefor, upon notice to all parties. Such application shall be in writing, addressed to the office of counsel, must be postmarked not later than 10 days prior to the date on which oral argument is scheduled to be heard, and shall set forth in full the reasons for the request. Oral argument of an appeal may not be adjourned solely by stipulation of the parties or their counsel.

(f) The maximum time allotted for oral argument will be 20 minutes for each party except in extraordinary cases where, upon application, the commissioner extends such time.

Historical Note

Sec. repealed, new filed Aug. 6, 1969; amd. filed Oct. 28, 1974 eff. Jan. 1, 1975. Amended (e).

276.3 Extensions of time to answer or reply. No extension of time to answer the petition or to reply to an answer will be granted by the commissioner unless timely application is made therefor, upon notice to all parties. Such application shall be in writing, addressed to the office of counsel, must be postmarked not later than five days prior to the date on which the time to answer or reply will expire, and shall set forth in full the reasons for the request. The time to answer a pleading may not be extended solely by stipulation of the parties or their counsel.

Historical Note

Sec. repealed, new filed Aug. 6, 1969 eff. Nov. 1, 1969.

276.4 Memoranda of law. Memoranda of law, consisting of the parties' arguments of law may be submitted by any party to an appeal, and may be requested by the commissioner or by his counsel. The petitioner shall serve a copy of any memorandum of law upon every other party to the appeal in the manner provided by subdivision (b) of section 275.8 of this Chapter, and shall file such memorandum of law, with proof of service thereof in accordance with section 275.9 of this Chapter, within 20 days after service of the answer. Each respondent shall serve a copy of any memorandum of law, upon every other party in the manner provided by subdivision (b) of section 275.8 of this Chapter, and shall file such memorandum of law with proof of service thereof in accordance with section 275.9 of this Chapter, within 30 days after service of the answer. Where the answer is served upon petitioner or petitioner's counsel by mail, the date of mailing and the four days subsequent thereto shall be excluded in the computation of the 20-day period in which petitioner's memorandum of law must be served and filed. Reply memoranda will be accepted only with the prior approval of the commissioner. The commissioner, in his sole discretion, may permit the late filing of memoranda of law upon written application by a party, setting forth good cause for the delay and demonstrating the necessity of such memoranda to a determination of the appeal, together with proof of service of a copy of such application upon all other parties to the appeal.

Historical Note

Sec. amd. filed July 30, 1968; repealed, new filed Aug. 6, 1969; amd. filed Jan. 27, 1978; repealed, new filed June 23, 1980; amd. filed July 29, 1983 eff. Sept. 1, 1983.

276.5 Records and reports. The commissioner may, in his discretion, in the determination of an appeal, take into consideration any official records or reports on file in the Education Department which relate to the issues involved in such an appeal.

Historical Note

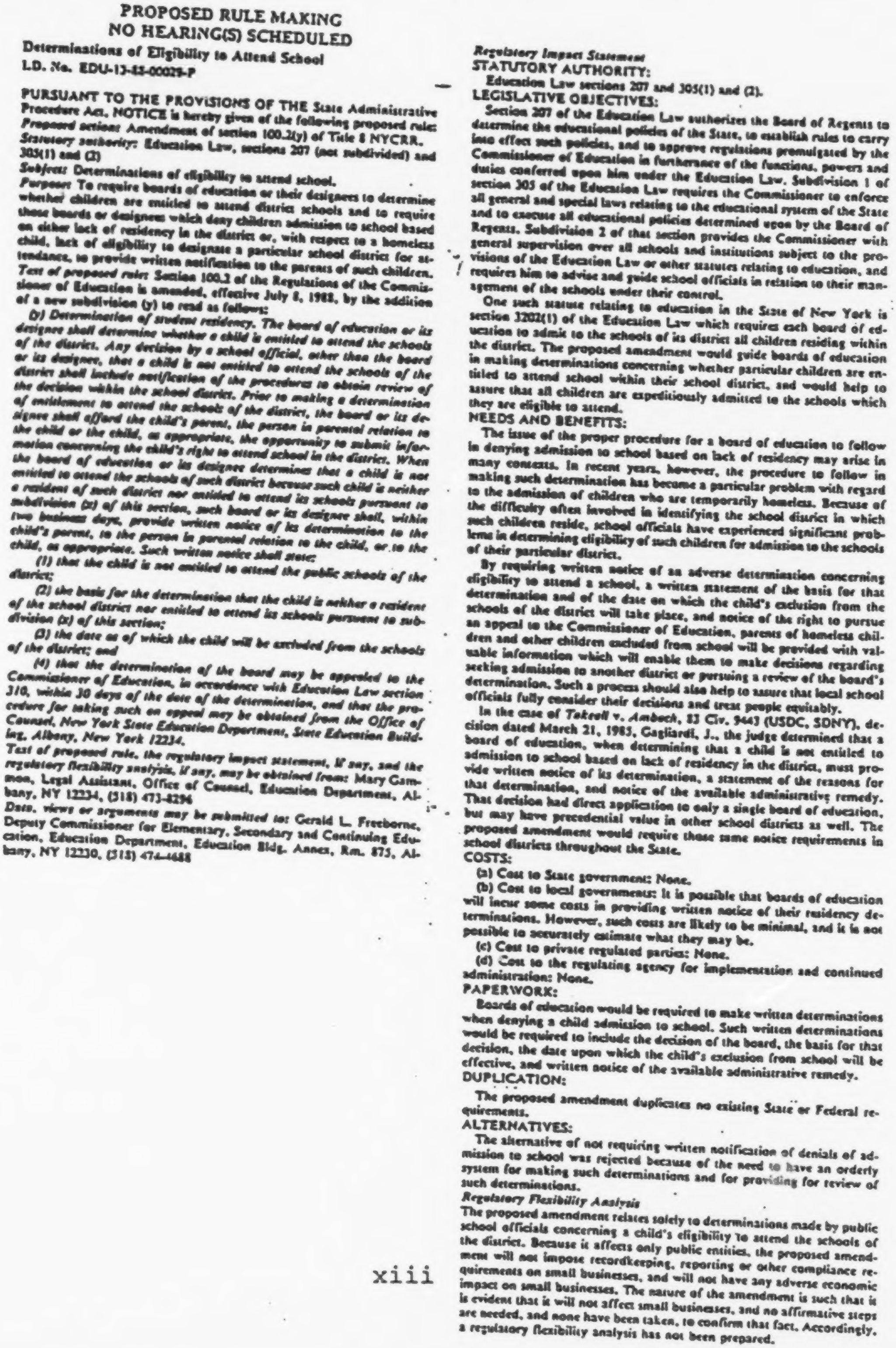
Sec. repealed, new filed Aug. 6, 1969 eff. Nov. 1, 1969.

276.6 Decisions to be filed. A copy of the decision of the commissioner in an appeal will be forwarded by the office of counsel to all parties to the appeal, or, if they be represented by counsel, to counsel for the respective parties, with instructions for service and filing as may be appropriate. A copy will also be sent to those persons or organizations who have been granted leave to submit memoranda *amicus curiae*.

Historical Note

Sec. repealed, new filed Aug. 6, 1969 eff. Nov. 1, 1969.

The Proposed Rule, "Determinations of Eligibility to Attend School," 8 NYCRR §100.2(y), effective July 8, 1988, N.Y. Reg. Vol. X, Issue 13, p.5, March 30, 1988, is as follows:



PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Determinations of Eligibility to Attend School

I.D. No. EDU-13-88-00029-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Amendment of section 100.2(y) of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided) and 305(1) and (2)

Subject: Determinations of eligibility to attend school.

Purpose: To require boards of education or their designees to determine whether children are entitled to attend district schools and to require those boards or designees which deny children admission to school based on either lack of residency in the district or, with respect to a homeless child, lack of eligibility to designate a particular school district for attendance, to provide written notification to the parents of such children.

Text of proposed rule: Section 100.2 of the Regulations of the Commissioner of Education is amended, effective July 8, 1988, by the addition of a new subdivision (y) to read as follows:

(y) Determination of student residency. The board of education or its designee shall determine whether a child is entitled to attend the schools of the district. Any decision by a school official, other than the board or its designee, that a child is not entitled to attend the schools of the district shall include notification of the procedures to obtain review of the decision within the school district. Prior to making a determination of entitlement to attend the schools of the district, the board or its designee shall afford the child's parent, the person in parental relation to the child or the child, as appropriate, the opportunity to submit information concerning the child's right to attend school in the district. When the board of education or its designee determines that a child is not entitled to attend the schools of such district because such child is neither a resident of such district nor entitled to attend its schools pursuant to subdivision (x) of this section, such board or its designee shall, within two business days, provide written notice of its determination to the child's parent, to the person in parental relation to the child, or to the child, as appropriate. Such written notice shall state:

(1) that the child is not entitled to attend the public schools of the district;

(2) the basis for the determination that the child is neither a resident of the school district nor entitled to attend its schools pursuant to subdivision (x) of this section;

(3) the date as of which the child will be excluded from the schools of the district; and

(4) that the determination of the board may be appealed to the Commissioner of Education, in accordance with Education Law section 310, within 30 days of the date of the determination, and that the procedure for taking such an appeal may be obtained from the Office of Counsel, New York State Education Department, State Education Building, Albany, New York 12234.

Text of proposed rule, the regulatory impact statement, if any, and the regulatory flexibility analysis, if any, may be obtained from: Mary Gammon, Legal Assistant, Office of Counsel, Education Department, Albany, NY 12234, (518) 473-8296

Data, views or arguments may be submitted to: Gerald L. Freeborne, Deputy Commissioner for Elementary, Secondary and Continuing Education, Education Department, Education Bldg. Annex, Rm. 875, Albany, NY 12230, (518) 474-4688

Regulatory Impact Statement

STATUTORY AUTHORITY:

Education Law sections 207 and 305(1) and (2).

LEGISLATIVE OBJECTIVES:

Section 207 of the Education Law authorizes the Board of Regents to determine the educational policies of the State, to establish rules to carry into effect such policies, and to approve regulations promulgated by the Commissioner of Education in furtherance of the functions, powers and duties conferred upon him under the Education Law. Subdivision 1 of section 305 of the Education Law requires the Commissioner to enforce all general and special laws relating to the educational system of the State and to execute all educational policies determined upon by the Board of Regents. Subdivision 2 of that section provides the Commissioner with general supervision over all schools and institutions subject to the provisions of the Education Law or other statutes relating to education, and requires him to advise and guide school officials in relation to their management of the schools under their control.

One such statute relating to education in the State of New York is section 3202(1) of the Education Law which requires each board of education to admit to the schools of its district all children residing within the district. The proposed amendment would guide boards of education in making determinations concerning whether particular children are entitled to attend school within their school district, and would help to assure that all children are expeditiously admitted to the schools which they are eligible to attend.

NEEDS AND BENEFITS:

The issue of the proper procedure for a board of education to follow in denying admission to school based on lack of residency may arise in many contexts. In recent years, however, the procedure to follow in making such determination has become a particular problem with regard to the admission of children who are temporarily homeless. Because of the difficulty often involved in identifying the school district in which such children reside, school officials have experienced significant problems in determining eligibility of such children for admission to the schools of their particular district.

By requiring written notice of an adverse determination concerning eligibility to attend a school, a written statement of the basis for that determination and of the date on which the child's exclusion from the schools of the district will take place, and notice of the right to pursue an appeal to the Commissioner of Education, parents of homeless children and other children excluded from school will be provided with valuable information which will enable them to make decisions regarding seeking admission to another district or pursuing a review of the board's determination. Such a process should also help to assure that local school officials fully consider their decisions and treat people equitably.

In the case of *Takeall v. Ambach*, 83 Civ. 9443 (USDC, SDNY), decision dated March 21, 1985, Gagliardi, J., the judge determined that a board of education, when determining that a child is not entitled to admission to school based on lack of residency in the district, must provide written notice of its determination, a statement of the reasons for that determination, and notice of the available administrative remedy. That decision had direct application to only a single board of education, but may have precedential value in other school districts as well. The proposed amendment would require those same notice requirements in school districts throughout the State.

COSTS:

(a) Cost to State government: None.

(b) Cost to local governments: It is possible that boards of education will incur some costs in providing written notice of their residency determinations. However, such costs are likely to be minimal, and it is not possible to accurately estimate what they may be.

(c) Cost to private regulated parties: None.

(d) Cost to the regulating agency for implementation and continued administration: None.

PAPERWORK:

Boards of education would be required to make written determinations when denying a child admission to school. Such written determinations would be required to include the decision of the board, the basis for that decision, the date upon which the child's exclusion from school will be effective, and written notice of the available administrative remedy.

DUPLICATION:

The proposed amendment duplicates no existing State or Federal requirements.

ALTERNATIVES:

The alternative of not requiring written notification of denials of admission to school was rejected because of the need to have an orderly system for making such determinations and for providing for review of such determinations.

Regulatory Flexibility Analysis

The proposed amendment relates solely to determinations made by public school officials concerning a child's eligibility to attend the schools of the district. Because it affects only public entities, the proposed amendment will not impose recordkeeping, reporting or other compliance requirements on small businesses, and will not have any adverse economic impact on small businesses. The nature of the amendment is such that it is evident that it will not affect small businesses, and no affirmative steps are needed, and none have been taken, to confirm that fact. Accordingly, a regulatory flexibility analysis has not been prepared.

The Proposed Rule, "Education of Homeless Children," 8 NYCRR §100.2(x), effective July 8, 1988, N.Y.Reg. Vol. X, Issue 13, p.5, March 30, 1988, is as follows:

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Education of Homeless Children

I.D. No. EDU-13-88-00028-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed action: Amendment of section 100.2(x) of Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 305(1) and (2), 3202(1) and 3205(1)

Subject: Education of homeless children.

Purpose: To minimize disruptions in the education of homeless children by enabling the parent of a homeless child to designate either the school district in which the child resided at the time he or she became homeless or the school district in which the child is temporarily located as the district in which the child will attend school.

Text of proposed rule: Section 100.2 of the Regulations of the Commissioner of Education is amended, effective July 8, 1988, by the addition of a new subdivision (x) to read as follows:

(x) Education of homeless children. (1) As used in this subdivision:

(i) Homeless child means a child entitled to attend school in the State of New York who, because of the unavailability of permanent housing, is living in a hotel, motel, shelter, or other temporary living arrangement in a situation in which the child or his or her family is receiving assistance and/or services from a local social services district, provided that the definition of homeless child shall exclude a child who has been placed by a court with, or whose custody has been transferred to, an authorized agency, as defined in subdivision 10 of section 371 of the Social Services Law, or the Division for Youth.

(ii) School district of last attendance means the school district within the State of New York in which the homeless child was attending a public school on a tuition-free basis when circumstances arose which caused such child to become homeless, or if not so attending, the school district in which the homeless child was entitled to attend school, or would have been entitled to attend school upon reaching school age.

(iii) School district of current location means the school district within the State of New York in which the hotel, motel, shelter, or other temporary housing arrangement of a homeless child is located.

(2) The parent or guardian of a homeless child, or the homeless child if no parent or guardian is available, may designate either the school district of current location or the school district of last attendance as the district in which such child shall attend upon instruction.

(i) Such designation shall be made on a form specified by the commissioner within a reasonable time after the child enters a new temporary housing arrangement, and except as otherwise provided in subparagraph (ii) of this paragraph, shall remain in effect for so long as such child remains in such temporary housing arrangement.

(ii) Within sixty days of commencing attendance at a school pursuant to a designation made in accordance with this paragraph, the parent, guardian, or child, as appropriate, may change the designation to the district of current location or to the district of last attendance if the parent, guardian or child finds the original designation to be educationally unsound.

(3) Whether a homeless child attends school in the district of current location or in the district of last attendance, such child shall be considered as a resident of such district for all purposes, provided that nothing herein shall be construed to require the board of education of the school district of last attendance to transport a child from a location outside such district to the school the child attends within such district.

(4) The parent or guardian of a homeless child in a temporary housing arrangement as of the effective date of this subdivision shall be entitled to designate either the school district of temporary location or the school district of last attendance as the school district his or her child will attend, provided that the parent or guardian of such child so notifies the school authorities of such district no later than August 1, 1988 or upon moving to a new temporary housing arrangement.

Text of proposed rule, the regulatory impact statement, if any, and the regulatory flexibility analysis, if any, may be obtained from: Mary Gammon, Legal Assistant, Office of Counsel, Education Department, Albany, NY 12234, (518) 473-8296

Data, views or arguments may be submitted to: Gerald L. Freeborne, Deputy Commissioner for Elementary, Secondary and Continuing Education, Education Department, Education Bldg. Annex, Rm. 875, Albany, NY 12234, (518) 474-4688

Regulatory Impact Statement

STATUTORY AUTHORITY:

Sections 207, 305, 3202 and 3205 of the Education Law.

LEGISLATIVE OBJECTIVES:

Section 207 of the Education Law authorizes the Board of Regents to determine the educational policies of the State, to establish rules to carry into effect such policies, and to approve regulations promulgated by the Commissioner of Education in furtherance of the functions, powers and duties conferred upon him under the Education Law. Subdivision 1 of section 305 of the Education Law requires the Commissioner to enforce all general and special laws relating to the educational system of the State and to execute all educational policies determined upon by the Board of Regents. Subdivision 2 of that section provides the Commissioner with general supervision over all schools and institutions subject to the provisions of the Education Law or other statutes relating to education, and requires him to advise and guide school officials in relation to their management of the schools under their control.

One such statute relating to education in the State of New York is section 3202 of the Education Law which specifies the school district in which children residing in New York State are entitled to attend school without the payment of tuition by their parents. That section is intended to assure that each child residing within the State is able to attend school on a tuition-free basis. Moreover, it is the strong policy of the legislature, as expressed in section 3205 of the Education Law, to require each child of compulsory school age within the State to receive instruction.

NEEDS AND BENEFITS:

Homelessness has become a growing problem both nationwide and within the State of New York. At present it is estimated that there are approximately 16,000 homeless children within New York State, of whom a little more than one-half are estimated to be over six years of age.

Among the many problems faced by homeless children and their families are difficulties in obtaining admission to school for school age children. The lack of a permanent residence often results in local school district determinations that the children are not entitled to attend school in the districts to which they seek admissions. As a result, the education of homeless children becomes fragmented as the children are moved from one temporary living arrangement to another, and may be interrupted for substantial periods of time. Such fragmentation and interruption seriously interferes with the child's ability to receive an adequate education.

Over the last couple of years, legislation has been proposed to allow homeless children to attend school in certain districts with which they have contact without regard to current residence. However, to date no such legislation has been enacted, and the availability of a meaningful educational opportunity for homeless children continues to be seriously impaired by disputes over the district in which a child actually resides in a situation in which the historically used indicia of residency are extremely difficult to apply. The result is that children who are entitled to attend school in this State, many of whom are of compulsory school age, are not attending school or are subject to interruptions which adversely affect their educational progress.

The proposed amendment would minimize disruptions in the education of homeless children by enabling the parent of a homeless child to designate either the school district of last attendance, as defined in the regulation, or the school district in which the child is temporarily located as the district in which the child will attend school. By clearly indicating the school districts which must admit the child if designated, delays in and denials of the provision of educational services to children entitled, and in some instances required, to attend school in New York will be minimized.

COSTS:

(a) Cost to State government: None. The State will continue to pay State aid to the school district providing educational services to the child.

(b) Cost to local governments: Under the proposed amendment, the board of education of the school district providing the educational services will be required to pay the local share of the cost of the child's education. This may result in some cost to the school district in those situations in which the district providing the instruction is not the district which would have been determined to be the child's residence under the traditional criteria for residency determinations. The average local cost per child in school districts throughout the State for the 1986-87 school year was $2,680, but it is not possible to estimate accurately the number of children for whom each school district will become responsible by reason of the proposed regulation. The State Education Department intends to recommend the enactment of legislation which will provide for the local cost of educating homeless children to be borne by the district of last attendance.

(c) Cost to private regulated parties: None.

(d) Cost to the regulating agency for implementation and continued administration: There will be some costs involved in monitoring compliance with the proposed regulation and in providing technical assistance in implementing the regulation. It is proposed that most of those costs will be covered by part of a Federal grant of $406,371 made pursuant to the Stewart B. McKinney Homeless Assistance Act.

PAPERWORK:

Parents will be required to complete a form specified by the Commissioner designating the school district in which their children will attend school.

DUPLICATION:

The proposed amendment duplicates no existing State or Federal requirements.

ALTERNATIVES:

If no regulation were adopted, many homeless children would be denied access to educational services, and the education of many others would be delayed pending a determination of residency. If all homeless children were required to attend school in the district of current location, the educational continuity of many children who are in temporary housing near the district of last attendance would be unjustifiably broken. If, on the other hand, all homeless children were required to attend school in the district of last attendance, many children who are in temporary housing far from that district would have to spend prohibitively long periods of time going to or from school. It is felt that parents are in the best position to determine the district in which the educational interests of their children will be best served.

Regulatory Flexibility Analysis

The proposed amendment relates solely to the admission of homeless children to public schools. Because it affects only public entities, the proposed amendment will not impose recordkeeping, reporting or other compliance requirements on small businesses, and will not have any adverse economic impact on small businesses. The nature of the amendment is such that it is evident that it will not affect small businesses, and no affirmative steps are needed, and none have been taken, to confirm that fact. Accordingly, a regulatory flexibility analysis has not been prepared.

FACTS AND PRIOR PROCEEDINGS

As amended, the complaint challenges only the procedure by which defendants denied the application for school admission. The facts regarding the plaintiff's exclusion from school as a nonresident are set forth in the Second Amended Complaint, in the affidavits of Margarita Arroyo, and in her Answers to Interrogatories.[4] This Court's prior opinion partially granting the preliminary injunction motion also sets forth many of the facts relevant to this motion. Orozco by Arroyo v. Sobol, 674 F.Supp. 125, 126-127 (S.D.N.Y. 1987).

Sixta Orozco moved with her mother to the City of Mount Vernon, Westchester County, New York from San Lorenzo, Puerto Rico in May of 1987. Due to urgent personal circumstances,[5] Ms. Arroyo intended to stay with a friend. She had previously lived in Mount Vernon.[6] Arrangements to stay with the friend did not materialize. Destitute, pregnant, and with no place to stay, Ms. Arroyo applied for public assistance from the Westchester County Department of Social Services at its Mount Vernon District office. She was found eligible, and she received emergency housing assistance to stay at the Trade Winds Motel, located in the City of Yonkers, a few blocks from the Mount Vernon border. While staying there, she sought to locate permanent housing in Mount Vernon.

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[4] Margarita Arroyo, Sixta Orozco's mother, has made three affidavits: The first was in support of the motion for a preliminary injunction, dated September 16, 1988. The second is dated March 4, 1988. The third is dated April 19, 1988.

[5] Second Amended Complaint, (14; Arroyo Affidavit, Sept. 16, 1987.

[6] The plaintiff alleges substantial prior contacts and residence in the City of Mount Vernon. When she first moved to Mount Vernon from San Lorenzo, she rented an apartment and was employed in Mount Vernon as a domestic worker for approximately three years. She returned to San Lorenzo, where she gave birth to Sixta in 1980. In April, 1981, she returned to Mount Vernon and resided there with Sixta until about November 1985. From then until May, 1987, she lived with Sixta in San Lorenzo, where Sixta began her schooling. Affidavit of Margarita Arroyo, March 4, 1988; Answers to Interrogatories, §2 and 3.

In August, 1987, Ms. Arroyo attempted to enroll Sixta, who was then six years of age, in the First Grade of the Mount Vernon public schools for the September term. Affidavit of Margarita Arroyo, September 16, 1987, §8 - 9. Her case worker from the Mount Vernon District office of the Westchester County Department of Social Services wrote a letter dated August 21, 1988, to aid the plaintiff in enrolling at the Hamilton School in Mount Vernon. Exhibit "A" to Second Amended Complaint. After an initial indication that she would be enrolled at the Hamilton School, Sixta was denied admission to the First Grade by the Mount Vernon Schools on or about September 9, 1987. Second Amended Complaint, §21. Ms. Arroyo was orally advised by a Mount Vernon school official that Sixta should attend the Yonkers Schools, because she was staying at a Yonkers motel. Affidavit of Margarita Arroyo, September 16, 1987, §9. Assuming it to be her only recourse, Ms. Arroyo next sought to enroll Sixta in the Yonkers public schools. On or about September 10, 1987, Yonkers school officials also refused to enroll her. They said that the

Mount Vernon schools should educate her. Second Amended Complaint, §23.

Meanwhile, the Fall semester began in early September, 1987 and Sixta Orozco was not in school, even though all parties agree that she was entitled to attend the free public schools under the Constitution of New York State and its Education Law, §3202. The Department of Social Services caseworker telephoned defendants Williams and Frank, officials of the Mount Vernon and Yonkers schools, respectively, seeking the plaintiff's admission, but to no avail. Second Amended Complaint, §26. See Orozco by Arroyo v. Sobol, 674 F.Supp. at 127.

Neither school district provided written notice to the plaintiff of its decision to deny admission. There was no statement of the facts and legal basis for the decision, nor was there notice of any opportunity for a hearing at which the plaintiff could present testimony or other evidence that she was a resident entitled to attend school. There was no notice of any opportunity to obtain a final decision regarding her residence by the State Commissioner of Education, which would be binding upon the local districts. As this Court observed, "[i]t appears that no 'hearing', however minimal, was held." Orozco by Arroyo v. Sobol, 674 F.Supp. at 127.

Prior Proceedings

This action pursuant to 42 U.S.C. §1983 was commenced on September 22, 1987, with a simultaneous application for a temporary restraining order and a motion for a preliminary injunction. Plaintiff requested that Sixta be admitted to school, or in the alternative, that defendants provide written notice of any denial and an opportunity for a hearing. A temporary restraining order was issued on September 24, 1987, directing the Yonkers Public Schools to educate Sixta pending a decision on her motion for a preliminary injunction and she was enrolled in the Yonkers schools.[7]

In opposing the preliminary injunction motion, the Mount Vernon defendants steadfastly maintained their position that the plaintiff is a resident of Yonkers, while the Yonkers defendants with equal vigor maintained that she had established residence in Mount Vernon and was only temporarily in Yonkers. Mount Vernon and Yonkers sharply disagree about where her residence was for school attendance purposes. The contention of Yonkers regarding her residence is as follows:

> ""Plaintiff is clearly not a resident of Yonkers."
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> ****
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> "[T]he undisputed facts make it apparent that the child and her mother have expressed a clear intention to take up permanent residence in Mount Vernon, have demonstrated ties to the Mount Vernon community, and were physically present within the borders of that community at the time when DSS assumed responsibility for locating temporary housing for the family."

Affidavit of Donald Batista, November 19, 1987, §6 and §18. In contrast, the Mount Vernon defendants contended as follows:

> "There was no residence in Mount Vernon that was ever established."

Memorandum of Law of Mount Vernon Defendants, November 18, 1987, P.4.

The State Commissioner agreed that the plaintiff "is sufficiently a resident of the state to have her right to a free public education;" he acknowledged that "Sixta Orozco applied to two districts and was rejected by both;" but he did not take a position as to which district was the proper district, stating that "he would have followed a case-by-case approach and determined the appropriate district for her free public education only if the plaintiff had commenced a formal appeal to the Commissioner pursuant to Section 310 of the New York Education Law,." Commissioner's Memorandum in Opposition to Preliminary Injunction Motion, November 17, 1987, Page 2-3. This procedural burden is at the heart of the remaining controversy in this case.

This Court granted in part the plaintiff's motion for a preliminary injunction, and directed the Yonkers Schools to continue her education pending the outcome of the litigation, "as long as the family continues to live under current or similar conditions in Yonkers, until the merits of this case are decided," Orozco by Arroyo v. Sobol, 674 F.Supp. at 132. No written notices were ever provided and no hearing was ever offered by any of the defendants concerning the denial of Sixta Orozco's application to attend the first grade.

The plaintiff continued to attend public school in Yonkers pursuant to this Court's order until she moved with her mother to San Lorenzo, Puerto Rico on March 5, 1988.[7] The plaintiff returned to San Lorenzo with her mother after they endured "extreme hardships" while unsuccessfully seeking housing and employment. In particular, Sixta's enrollment in the Yonkers schools limited her mother's opportunity to have Mount Vernon friends assist in after school child care so that she could seek housing and employment. Affidavit of Margarita Arroyo, April 19, 1988 §1-3. Her decision to live in San Lorenzo at this time, however, "does not represent an intention to permanently forego [her] plans to reside in Mount Vernon. There is a possibility that [she] will return to New York and take up residency in Mount Vernon while Sixta is still of school age," because she found education and employment opportunities to be better there than in San Lorenzo. Affidavit of Margarita Arroyo, April 19, 1988, §4-5.

The Practice, Policy, Custom or Usage of the Defendants

The second amended complaint alleges the existence of a practice of the defendants to allow pupils to be denied school admission because of nonresidence without notice or an opportunity for a meaningful hearing at which they could contest a denial. The complaint alleges as follows, with regard to the local school defendants:

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[7] Letter of Julie A. Mills, Exhibit "C" to Thomas Affidavit in support of Yonkers defendants' motion to dismiss.

> "[The] Board of Education, or its employees having policy making authority, have a practice, pattern, policy, custom, or usage, when an applicant to the public schools is denied admission, not to provide written notice to the applicant and the applicant's parent of the following:
> -Notice of the decision to deny admission.
> -Notice of the factual basis for the decision.
> -Notice of the legal grounds for the decision.
> -Notice of any opportunity to provide additional information in support of the application.
> -Notice of an opportunity for a prompt and meaningful hearing before an impartial decision maker.
> -Notice of the possible availability of assistance from legal services organizations or other community organizations that might provide assistance to denied school applicants and their parents.
> -Notice of any informal avenues of redress and notice of the right to review of the decision by the Commissioner of Education under Section 310 of the New York Education Law.

Second Amended Complaint, §24. With regard to the State Commissioner, the plaintiff alleges as follows:

> Defendant Sobol knew or reasonably should have known that school districts under his supervision have a pattern or practice of summarily denying admission to pupils determined to be nonresidents, without timely, adequate written notice of such determinations, and without notice of a meaningful opportunity to review such determinations. The Commissioner's rules and regulations do not require local districts to maintain any records at all regarding their denials of admission to school, and he has not promulgated any procedural safeguard to prevent or minimize the possibility of erroneous, summary denials of enrolment of children who are entitled to a free public education. There is no procedure that would provide homeless children in New York State and their parents a meaningful hearing and timely decision after a hearing on their exclusion from the public schools. The Commissioner has condoned or ratified the pattern or practice of the local districts to deny school admission summarily, without timely and adequate notice of the determination and notice of an

> opportunity for a hearing.

Second Amended Complaint, §46.

The Administrative Remedy: The Section 310 Appeal

None of the defendants notified plaintiff of any opportunity to bring an appeal pursuant to Section 310 of the New York Education Law. At the time she was denied, she was unrepresented by counsel and she was given no written notice at all of the decision. Under Section 310 of the New York Education Law, an appeal on papers may be taken to the Commissioner of Education to review an act of a local school official. The plaintiff alleges as follows with regard to the Section 310 process:

> 30. Because of the time it takes for the State Commissioner of Education to decide appeals under Section 310 of the New York Education Law, and because of the complexity of his rules of procedure, a Section 310 appeal does not provide a meaningful review at a meaningful time for the denied school applicant, who is typically unrepresented by counsel. The Commissioner of Education makes no provision in his rules for waiver of filing fees for poor persons. The Commissioner provides no form petitions for parents or children seeking to review a denial of school enrollment. All papers filed must be typewritten. Papers must be personally served by a non-party. Petitions must be verified before a notary public. Affidavits from process servers must be obtained. A $20 filing fee is required. There are special rules for interim orders. There is ordinarily no opportunity to present oral evidence. Oral argument is heard by the Commissioner only in Albany.

Second Amended Complaint, §30. Plaintiff has submitted evidence that a Section 310 appeal to the Commissioner in a pupil residence case filed in September, 1987, Matter of Tynan, has not yet been decided as of this date in June, 1988;

that it took 22 days to obtain an interim order for admission, and that more than 20 hours of lawyer time were required to handle the matter.[8] In Matter of Takeall, 23 Ed. Dept. Rep. 475 (1984), it was approximately 30 days before the State Commissioner issued an interim order directing the admission of a pupil who had been excluded for nonresidence.[9]

The New Regulations

During the pendency of the preliminary injunction motion, the State Commissioner said that "the potential precedental effect" of Takeall v. Ambach, 609 F.Supp. 81 (S.D.N.Y. 1985) "is being considered." Commissioner's Brief in Opposition to Motion for Preliminary Injunction, p. 12, fn. The State Commissioner then proposed a new regulation which would require local school districts to follow the written notice requirement of Takeall v. Ambach, supra, when they deny a pupil's application to attend school. The "Regulatory Impact Statement" states:

> "[S]chool officials have experienced significant problems in determining eligibility of such children for admission to the schools of their particular district."
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> * * *
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> In the case of Takeall v. Ambach, 83 Civ. 9443 (USDC, SDNY, decision dated March 21, 1985, Gagliardi, J. the Judge determined that a board of education, when determining that a child is not entitled to admission to school based on lack of residency in the district, must provide written

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[8] Affidavit of Julie A. Mills, June 2, 1988, §5 .

[9] Id., §13.

> notice of its determination, and notice of the available Administrative remedy. That decision may have precedential value in other school districts as well. The Proposed Amendment would require those same notice requirements in school districts across the State."

"Determination of Eligibility to Attend School," Regulatory Impact Statement, Proposed Amendment to Regulations of the Commissioner of Education, 8 NYCRR §100.2(y), NYS Register Vol. X, Issue 13, p. 5. March 30, 1988. The proposed regulation was approved by the State Board of Regents on May 20, 1988, and will be effective on July 8, 1988. In essence, the new regulation adopts the written notice requirements of Takeall v. Ambach, 609 F.Supp. 81 (SDNY 1985), but does not provide for notice of any remedy other than the Section 310 appeal.

The Commissioner also promulgated a proposed regulation which treats homeless children as nonresidents, and gives them or their parents a choice, subject to certain limitations, as to the district they will attend. Proposed Rule 8 NYCRR §100.2(x), "Education of Homeless Children," NYS Register, Vol. X, Issue 13, p.3, March 30, 1988. The proposed regulation, to be effective July 8, 1988, applies only to persons receiving public assistance, and would not apply to plaintiff if, for example, she returns from Puerto Rico and stays in the home or apartment of a friend.

On May 20, 1988, the proposed regulation was approved in a substantially modified form by the State Board of Regents. To date, the revised form of the proposed regulation has not been published in the State Register.

POINT I

THE COURT SHOULD NOT ABSTAIN

The defendants urge the Court to abstain under the familiar "Pullman" doctrine, established in Railroad Commission of Texas v. Pullman Co., 312 U.S.496 (1941).[10] Pullman abstention is appropriate where the "dispute concerns a controlling issue of state law that is unclear and the resolution of which could avoid the constitutional issue presented ..." Catlin v. Ambach, 820 F.2d 588, 589 (2d Cir. 1987).

The Catlin plaintiffs challenged on equal protection grounds the State's statutory scheme, as applied, for funding the education of handicapped pupils who live apart from their parents in a "family home" in another school district. The Second Circuit abstained sua sponte, because the contested classification, which appeared to discriminate against the plaintiff, might not exist if the unclear statutory scheme were interpreted by the state courts.

Catlin is readily distinguishable and is not applicable here. Plaintiff has abandoned her equal protection claim.[11]

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[10] See Yonkers Defendants' Memorandum of Law, Point III, p.14; State Commissioner's Memorandum, p.31.

[11] Under the State Constitution, all children are entitled to attend the "free, common schools". N.Y.Const. Art. XI, Sec.1. The Education Law allows pupils to attend free schools only "in the district in which such person resides." N.Y. Education Law, §3202. The only way to harmonize the statute and the state Constitution is a construction of the statute which gives each pupil a "residence" for school attendance

With that issue out of the case, there is no unclear state statute relevant to the only issue left, the procedural due process issue. Defendants do not argue that the hearing plaintiff contends should have been offered is actually or even arguably available under some state law. No state law or regulation requires the notice and hearing plaintiff claims was due her under the federal constitution when her applications for school admission were denied summarily. Where there simply is no state law which might provide the relief sought, abstention is inappropriate. Naprstek v. Norwich, 545 F.2d 815, 818 (2d Cir. 1971).

In Memphis Light Gas and Water Div. v. Craft, 436 U.S. 1, 98 S.Ct. 1554 (1978), defendants claimed during litigation that procedures existed which offer due process to consumers in utility shut-off matters. The plaintiffs amended their complaint about the lack of any procedures to challenge the lack of notice of the theoretically "available" procedures for review. The Supreme Court held that notice of the existing procedural remedies was required as a matter of due process. Id., 436 U.S. at 14, 98 S. ct. at 1562. Accord, Takeall v. Ambach, 609 F. Supp. 81, 86 (S.D.N.Y. 1985). In this case, however, no defendant claims that there was any law, rule or

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purposes. E.g., Matter of Richards, Ed. Dept. Rep. (1985). Plaintiff's equal protection claim of discriminatory treatment toward homeless children, like the as-applied equal protection claim in Catlin, was susceptible of evaporation through a construction of the State's statutory and constitutional scheme which would determine her district of residence.

regulation[12] requiring notice to the plaintiff of an opportunity for a hearing.

Pullman abstention is also inappropriate when "the unconstitutionality of the particular state action under challenge is clear . . . " Thornburgh v. American College of Obstetricians, 476 U.S. --, 106 S.Ct. 2169, 2176 (1986). In this case, "[i]t appears that no 'hearing,'however minimal, was held and that no written notice was provided to Ms. Arroyo explaining the basis of the decision and her options." Orozco by Arroyo v. Sobol, 674 F. Supp. 125, 127 (S.D.N.Y. 1987). The due process issue is whether school officials may just say "no" to a pupil believed to be an outsider, or whether there must be notice of an opportunity for a hearing. Where no provision of state law in force at the time required any notice to the plaintiff of the action, and where there was no requirement that the denied school applicant receive notice of an opportunity for a hearing of any type, the unconstitutionality is clear beyond doubt. Deciding exactly what due process required in this situation is a pure question of federal constitutional law. Although the exact requirements of due process in this context may be uncertain at this stage of proceedings, and need not be decided at the pleadings stage on this motion, it should be clear beyond doubt that public school officials may not just say "no" to pupils seeking admission. Instead, there must be notice and some kind of hearing to resolve a claim for public school admission which has been denied due to alleged nonresidence.

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[12] The State's recent promulgation of a proposed regulation requiring the limited "Takeall" notice, only reduces the need for prospective injunctive relief, and is of no relevance to plaintiff's damage claim.

Accordingly, because (1) there is no unclear issue of state law, (2) the case presents solely a question of procedural due process under the federal constitution, and (3) there is a clear violation of due process, the Court should not abstain.

POINT II

VENUE IN THE SOUTHERN DISTRICT IS PROPER

The State Commissioner argues that the case is improperly venued in the Southern District because his office is in Albany, which is in the Northern District.[13] Plaintiff contends that venue is proper under 28 U.S.C. §1392(a).

For purposes of venue analysis, we assume that the State Commissioner's actions or, more precisely, the inaction, occurred in Albany, in the Northern District, where the Commissioner's residence is for official purposes. Canaday v. Koch, 598 F. Supp. 1139, 1143 (S.D.N.Y. 1984); Andrew H. by Irene H. v. Ambach, 579 F. Supp. 85, 88 (S.D.N.Y. 1984); Birnbaum v. Blum, 546 F. Supp. 1363, 1366 (S.D.N.Y. 1982); Procario v. Ambach, 466 F. Supp. 452, 453 (S.D.N.Y. 1979). Even so, venue in the Southern District under Section 1392(a) is proper. That section provides as follows, in relevant part:

> "(a) Any civil action, not of a local nature, against defendants residing in different districts in the same State, may be brought in any of such districts.

28 U.S.C. §1392(a). This provision governs because the Yonkers defendants and the Mount Vernon defendants are residents of the Southern District, and the State Commissioner resides in the Northern District.

The Commissioner attempts to characterize the action as viable only against the local defendants. He seeks to saddle them with the exclusive liability for any due process denial. While the local defendants did deny plaintiff the process held to be due in Takeall v. Ambach, 609 F.Supp. 81 (S.D.N.Y. 1985), the plaintiff also alleges a failure of the State Commissioner to devise a constitutional process for resolving conflicting residence determinations of local school districts. If either Mount Vernon or Yonkers had jurisdiction or power to make a binding, administratively final decision that the plaintiff resided in the other's district, then the Commissioner's role might be viewed as judicial and appellate. However, only the Commissioner can settle a dispute involving conflicting residence determinations. Plaintiff contends that the due process clause requires him to afford a timely and meaningful opportunity for such a resolution to the denied school applicant. Accordingly, because of the necessary involvement of the Commissioner in the administrative process for resolving residence disputes, the action is not merely of a "local" nature, and venue in the Southern District is proper under 28 U.S.C. §1392(a).

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[13] State Commissioner's Memorandum, p.10 fn.

POINT III

THE PLAINTIFF HAS STANDING TO CHALLENGE THE DEFENDANTS' PRACTICE OF NOT PROVIDING NOTICE AND A HEARING TO A-SCHOOL APPLICANT DENIED FOR NONRESIDENCE

The State Commissioner contends that the plaintiff lacks standing because she has not brought a formal appeal under Section 310 of the New York Education Law.[14] He relies upon this Court's remark that even after Supreme Court rulings making exhaustion of administrative remedies unnecessary in Section 1983 cases, the plaintiff must still satisfy other requirements such as standing. Orozco by Arroyo v. Sobol, 674 F. Supp. at 131 fn.8.

To establish standing, the plaintiff need only show (1) that she has suffered an "injury in fact," and (2) that the interest she seeks to protect is "arguably within the zone of interests to be protected" by the due process clause. Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 152-153, 90 S.Ct. 827, 829-830 (1970). Clearly, the first part of the test is satisfied because plaintiff has alleged sufficient injury in fact arising from the treatment she received: summary denial of her request for public school enrollment, without notice of a meaningful opportunity for a hearing before an impartial decision maker who could resolve administratively the question of her residence. The second part of the test is met because plaintiff's interest in receiving notice and some kind of hearing concerning her exclusion from school is clearly an interest protected by the due process clause. Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042 (1978); Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992 (1975); Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729 (1975). The Court of Appeals has indicated that the second branch of the test, the "zone of interest," allows room for some judicial "prudential considerations." Doe v. Blum, 729 F.2d 186, 189 (1984). One prudential consideration is judicial economy. The plaintiff has brought this federal action to test the constitutionality of the administrative actions and inaction of the several defendants. The plaintiff is clearly entitled to a ruling by the court regarding the constitutionality of the treatment that actually was afforded her. In passing on her damage claims, the Court will eventually decide whether defendants could simply deny plaintiff without notice of a hearing of any kind, and whether defendants were constitutionally obliged to offer an opportunity for resolution of conflicting local residence determinations other than an appeal to the State Commissioner under Section 310 of the Education Law. There is every reason to decide the request for declaratory and injunctive relief as well. As stated by Judge Friendly in Ellis v. Blum, 643 F.2d 68 (2d Cir. 1981):

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[14] Defendant Commissioner's Memorandum, Point II, pages 13-15.

> "Trial of plaintiff's damages claim will necessarily require the district court to pass on the very

> question of the validity of the pretermination practices on which the propriety of declaratory or injunctive relief depends.

Id., 643 F.2d at 84. Significantly, the Ellis court did not require the plaintiff to seek statutory remedies under the Social Security Act to challenge on constitutional grounds a practice of terminating disability payments by telephone, without prior written notice. Similarly, in Holmes v. New York City Housing Authority, 398 F.2d 262 (2d Cir. 1968), the Court of Appeals for the Second Circuit stated as follows:

> "There is no merit in the Authority's contention that the plaintiffs are without standing to raise the due process objection. As applicants for public housing, all are immediately affected by the alleged irregularities in the practices of the authority."

Id., 398 F.2d at 265.

Defendants' argument regarding the Section 310 appeal is little more than a rephrasing of the now foreclosed exhaustion of administrative remedies defense. Plaintiff challenges the sufficiency of the process that was afforded her when her child was excluded from school. She is entitled to a ruling on that issue. Even if the answer ultimately is that there is no constitutional requirement for any administrative procedure other than the Section 310 appeal, plaintiff has standing to obtain a ruling on the merits. Defendants' reliance upon Campo v. New York City Employee's Retirement System, -- F.2d--, (2d Cir. Slip Op. No. 87-7237 March 31, 1988) is misplaced. The Second Circuit reached the merits of the plaintiff's complaint about the lack of administrative due process for a person claiming a derivative pension benefit, and found that a state court judicial remedy offered sufficient due process. In doing so, there was no requirement that the plaintiff first pursue the-remedy that was challenged and ultimately found to be adequate.

Accordingly, plaintiff has standing to maintain her action for declaratory and injunctive relief and damages.

POINT IV

THE ELEVENTH AMENDMENT DOES NOT BAR A CLAIM FOR PROSPECTIVE DECLARATORY AND INJUNCTIVE RELIEF AGAINST THE COMMISSIONER

The State Commissioner invokes the Eleventh Amendment as a bar to claims against him in his official capacity.[15] The Eleventh Amendment does not bar actions against State officers in their official capacity for injunctive and declaratory relief against unconstitutional practices. Dwyer v. Regan, 777 F.2d 825, 836 (2d Cir. 1985); Takeall v. Ambach, 609 F. Supp. 81, 84 (S.D.N.Y. 1985). The Commissioner's reliance upon Fay v. South Colonie Cent. School Dist., 802 F. 2d 21 (2d Cir. 1986) is misplaced because the plaintiff in Fay only alleged statutory violations and non-viable constitutional claims against the Commissioner. Id., 802 F.2d at 31, 33.

Plaintiff clearly seeks prospective injunctive relief against the State. The Commissioner's promulgation of proposed regulations that would only partly meet the demand of the plaintiff for prospective injunctive relief (i.e., written notice) does not entirely moot the plaintiff's claim for prospective relief and declaratory relief. (See Point V, *infra*). As the Court of Appeals said recently:

> "The argument that a permanent injunction should be denied because the ... defendants ... have discontinued enforcement of the unconstitutional provisions is unpersuasive. There can be no doubt that 'the court's power to grant injunctive relief survives discontinuance of the illegal conduct,' United States v. W.T. Grant Co., 345 U.S. 629, 633,

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[15] State Commissioner's Memorandum, p.15.

> 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953), and that it is appropriate to exercise that power when 'there exists some cognizable danger of recurrent violation,' id."

Soto Lopez v. New York City Civil Service Com'n, 840 F.2d 162, 168 (2d Cir. 1988). The Yonkers defendants note that this is not a class action, but that is of no practical significance where plaintiff still seeks injunctive and declaratory relief. As stated by the Court of Appeals:

> "[A]n injunction is an appropriate remedy especially when, as here, it is conceded that the officials will otherwise continue to enforce the unlawful provisions against some who are not parties to the suit. Given an established unconstitutionality, it would be, in the words of Judge Friendly, "unthinkable' to permit the officials to 'insist on other actions being brought.' See Vulcan Society v. Civil Service Commission, 490 F.2d 387, 399 (2d Cir. 1973). In such circumstances, injunctive relief is appropriate without the recognition of a formal class, for 'insofar as the relief sought is prohibitory, an action seeking declaratory or injunctive relief against state officials on the ground of unconstitutionality of a statute or administrative practice is the archetype of one where class action designation is largely a formality, at least for the plaintiffs.' Galvan v. Levine, 490 F.2d 1255, 1261 (2d Cir. 1973), cert. denied, 417 U.S. 936, 94 S.Ct. 2652, 41 L.Ed.2d 240 (1974).

Soto-Lopez, supra, 840 F.2d at 168-169. This reasoning is fully applicable, because defendants do not contend that they will now or in the future provide the opportunity for a hearing plaintiff claims is constitutionally due to the denied school applicant.

The State Commissioner also argues that plaintiff has not sufficiently alleged a claim for declaratory relief.[16] The claim for a declaratory judgment, which would clarify the obligation of school officials to provide due process to denied school applicants, is particularly appropriate to resolve a problem that is likely to recur again. Super Time Engineering Company v. McCorkle, 416 U.S.125, 121-122, 94 U.S.Ct 1694, 1698 (1974) (Action is not moot where there is a live claim for declaratory relief). A declaration that the denial of school admission without written notice and a meaningful opportunity for a hearing "was" in violation of plaintiff's rights would serve to protect plaintiff from any future recurrence. The semantic distinction made by the State Commissioner, who objects to the use of the past tense in the prayer for declaratory relief, is of no practical significance.

The Commissioner baldly asserts that he "violated no federal law," while plaintiff contends with equal vigor that the constitution clearly requires him to afford a timely and meaningful hearing for denied school applicants to demonstrate their eligibility to attend school. Although due process is flexible, and procedures can be tailored to suit the genius of a particular administrative scheme, the absence of any notice or meaningful hearing opportunity for the applicant, who was unrepresented at the time of injury, is glaringly deficient. Accordingly, the Commissioner and the Yonkers defendants should be made to answer the complaint, and the plaintiff should have the opportunity to establish the inadequacy of the procedure afforded her.

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[16] State Commissioner's Memorandum, p. 16.

POINT V

PLAINTIFF'S CLAIMS FOR DECLARATORY AND INJUNCTIVE RELIEF ARE NOT MOOT

Plaintiff contends that her recent move to Puerto Rico does not affect her right to an adjudication of the merits of her claims for declaratory and injunctive relief and for damages against the defendants. Article III of the Constitution limits the exercise of judicial power if there is no real case or controversy. Nebraska Press Assn. v. Stuart, 427 U.S. 539, 546, 96 S.Ct. 2791 (1976); Preiser v. Newkirk, 422 U.S. 395, 401, 95 S.Ct 2330 (1974). "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome . . . [w]here one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy." Powell v. McCormack, 395 U.S. 486, 496-497, 89 S.Ct. 1944, 1951 (1969). A case is not moot so long as any single claim for relief remains viable, whether that claim was the primary or secondary relief originally sought." Id. at 496, 500, 89 S.Ct. 1944.

That the dispute between the parties was very much alive when suit was filed, or at the time the Court of Appeals rendered its judgment, cannot substitute for the actual case or controversy ...." Honig v. Doe, __ U.S. __, 98 L.Ed.2d 686, 703 (1988). A mere change of circumstances, however, does not necessarily moot a case. When intervening events affect the relationship between the parties that existed when the suit was commenced, "mootness may not be invoked to deny adjudication of questions which are 'capable of repetition yet evading review.'" Ramer v. Saxbe, 522 F.2d 695, 704 (D.C.Cir. 1975). See, e.g., Honig v. Doe, supra; Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498, 514, 31 S.Ct. 279, 283 (1911).[17] In this term's review of the "capable of repetition" exception to the mootness doctrine, the Supreme Court underscored its broad reach in cases where there is a "reasonable likelihood" or "possibility" of recurrence:

> "In the present case, we have jurisdiction if there is a reasonable likelihood that respondents will again suffer the deprivation of ... rights that gave rise to this suit. We believe that, at least with respect to respondent Smith, such a possibility does exist and that the case therefore remains justiciable."

Honig v. Doe, supra 98 L.Ed.2d at 703. Significantly, the Honig plaintiffs were handicapped pupils who sought declaratory and injunctive relief after they were excluded from public school.[18] By the time the case reached the Supreme Court, however, the only remaining plaintiff of school age had dropped out, and no longer attended school, although he was still entitled to attend. The Supreme Court found that there was "a sufficient likelihood" that the plaintiff would choose to re-enroll in the public schools, that he again would be suspended for misbehavior, and that the state education commissioner would not adopt rules to prohibit local school officials from unilaterally excluding the handicapped pupil, in violation of the EHA.

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[17] Chief Justice Rehnquist recently indicated his belief "that while an unwillingness to decide moot cases may be connected to the case or controversy requirement of Art III, it is an attenuated connection that may be overridden where there are strong reasons to override it. The 'capable of repetition yet evading review' exception is an example". Honig v. Doe, __ U.S. __, 98 L. Ed.2d 686, 712 (1988) (Concurring opinion).

[18] Honig did not present a live damage claim. Damages under 42 U.S.C. §1983 ordinarily are not available to pupils seeking remedies under the Education of All Handicapped Children Act. See, Quackenbush v. Johnson City School Dist., 716 F.2d 141 (2d Cir. 1983) (Damages available under 42 U.S.C. 1983 where school denies access to EHA administrative remedies).

In this case, plaintiff maintains her demand for prospective permanent injunctive relief, to enjoin defendants from any future denial of admission to school without written notice and an opportunity for a hearing[19] and a final, binding determination of residence by the State Commissioner of Education.

The State Commissioner argues that there is not a "sufficient probability" of a recurrence.[20] There is no requirement, however, that the possibility of recurrence be "more likely than not" so as to justify a finding of fact or a presumption that it will in fact recur. Honig, supra 100 S.

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[19] The Second Amended Complaint at Page 17 demands, among other things, "a permanent injunction enjoining defendants from denying school admission to plaintiff without providing adequate written notice and an opportunity for a prompt hearing and decision...." The plaintiff's move to Puerto Rico means, of course, that there is no need now for injunctive relief requiring defendants to reevaluate her previously denied applications to attend public school. Thus, while her claim for injunctive relief regarding her prior applications is moot, her request for prospective relief is not moot.

[20] Commissioner's Memorandum in support of Motion to Dismiss, p.12.

Ct. at 601 n.6. Justice Scalia argued in his dissent in Honig that the likelihood of recurrence should be a "demonstrated probability" such that a recurrence could be presumed to occur. The majority said that Justice Scalia "overstates the stringency of the 'capable of repetition test,' and that the Court "in numerous cases ... found controversies capable of repetition based on expectations that, while reasonable, were hardly demonstrably probable." Honig, 98 L.ed.2d at 704 footnote 6. Honig makes it clear that a controversy over school exclusions will not be considered moot where the pupil has withdrawn from school but there is a possibility of re-enrollment and a recurrence of the injury. Cf. De Funis v. Odegaard, 416 U.S. 312, 319, 94 S.Ct. 1704 at 1707 (1974) (Action moot where plaintiff seeking injunctive relief from school admissions policy "will never again be required to run the gantlet of the Law School's admission process" because he was about to graduate, and had not asserted damage claims). The defendants' reliance upon Defunis is entirely misplaced because 1) there is still a possibility of recurrence and 2) the plaintiff has asserted damage claims. The Supreme Court's recent decision in Honig also casts great doubt upon the vitality of Rose v. State of Nebraska, 530 F.Supp. 295 (D. Neb. 1981), affirmed sub nom Monahan v. Nebraska, 687 F.2d 1165, at 1168 (8th Cir. 1982), upon which the defendants rely. In Monahan, circumstances very similar to those in Honig and in this case were present: plaintiff sought declaratory and injunctive relief against school officials challenging their decision denying a placement of a handicapped child, but then moved to "another school district and does not attend school." *Monahan*, *supra*, 687 F.2d at 1168. The Eighth Circuit regarded her statement "that she plans to move back" as "speculative," because "we are not told when this will occur." *Id*. Because the *Honig* decision now makes it clear that the likelihood of recurrence need only be a reasonable "possibility," cases following a standard requiring a "demonstrated probability" of the likelihood of repetition are no longer applicable. *E.g.*, *Monahan*, *supra*; *Jefferson v. Abrams*, 747 F.2d 94, 96 (2d Cir. 1984) ("'reasonable expectation' or 'demonstrated probability'").

Of course, a factor not present in *Honig* is that the plaintiff has gone to Puerto Rico, and is no longer a resident of New York State entitled under its Constitution to attend the public schools. The fact that plaintiff is now in Puerto Rico, however, does not foreclose the possibility that she will return. She is free to return to New York at any time,[21] and has indicated in her affidavit that she may do so.

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[21] Poverty cannot be assumed to bar her return to New York. Welfare benefits may not be denied to persons because of their exercise of the constitutional right to travel, *Shapiro v. Thompson*, 398 U.S. 618 (1969). See *Gaddis v. Wyman*, 397 F.Supp. 717 (S.D.N.Y. 1969) *aff'd sub nom Wyman v. Bowens*, 397 U.S. 49 (1970), which involved public assistance eligibility for persons who had moved to Westchester County from Puerto Rico. Emergency assistance must be provided to homeless needy persons. *Gonzales v. Blum*, 127 Misc.2d 558, 486 N.Y.S.2d 558 (Sup. Ct. Westchester County 1985) (Due process requires written notice and hearing on denial of public assistance to applicant 'newly arrived from Puerto Rico').

Several factors, considered together, make it sufficiently likely that plaintiff will again suffer an exclusion from school without due-process: the history of plaintiff's periodic migration from San Lorenzo to Mount Vernon and back; her poverty and reliance upon friends or public assistance for temporary shelter; the absence of any state requirement of adequate notice and an opportunity for a hearing on a denial of school admission for residence reasons; the steadfast positions of the local school officials regarding their prerogative to make summary determinations of residence; and the absence of a procedure for the state to resolve residence disputes administratively through a process invocable by the indigent and uneducated.

The time period involved in the challenged procedure-summary denials without notice of an opportunity for a prompt hearing - is too short to permit full adjudication of the challenged denial of due process in any case without there being a shift of circumstances while the case is pending. Rastelli v. Warden, Metro. Correctional Center, 782 F.2d 17, 20 (1986) (31 to 119 days "has clearly proved too short to allow litigation of the issue in the instant case"). Thus, the claim for a declaratory judgment which would clarify the obligation of school officials to provide due process to the denied school applicant is particularly appropriate. Super Tire Engineering Company v. McCorkle, 416 U.S.125, 121-122, 94

U.S.Ct 1694, 1698 (1974) (Action is not moot where there is a live claim for declaratory relief).

The Commissioner belatedly proposed a regulation that will require districts to provide the type of written notice mandated by Takeall v. Ambach, 609 F.Supp. 81 (S.D.N.Y. 1985). See Proposed Rule, "Determinations of Eligibility to Attend School," NYS Register, Vol X, Issue 13, p.5, March 30, 1988. The new regulation, however, does not require that any hearing be afforded on the denial of an application for public school enrollment, and it makes no provision for a swift and simplified review by the State Commissioner which would resolve inconsistent or erroneous residence determinations of the local school districts. Therefore, the issue clearly is one "capable of repetition, yet evading review." Gerstein v. Pugh, 420 U.S.103, 110, n. 11 (1975); William v. Ward, -- F.2d --, slip opinion at 6696 fn.6 (2d Cir. No. 87-7572 April 19, 1988); Rastelli v. Warden, Metro. Correctional Center, 782 F.2d 17, 20 (1986) (reasonable expectation that plaintiff, now imprisoned, "will again be subject to revocation proceedings, that his case will be designated for original jurisdiction and that he will again be subject to the regulation"); Pierce v. LaValle, 293 F.2d 233, 234 (2d Cir. 1961).

The proposed regulation offering "homeless" pupils a choice of schools is not in force, and even if in effect, would not address the situation if a pupil stays with friends instead of at a shelter or motel, as plaintiff originally did.

Also, there is still room for inter-district bickering over which district, if any, is the "district of last attendance" and which is the "district of current location." Proposed 8 NYCRR §100.2(x)(ii) and (iii).[22]

The Yonkers defendants misplace their reliance upon *Rettig v. Kent City School Dist*., 788 F.2d 328 (6th Cir. 1986); and *Gay and Lesbian Students Ass'n Cohn*, 656 F. Supp. 1045 (W.D. Ark. 1987). In both cases, the claims of mootness were rejected. *Rettig*, *supra* at 330; *Gay and Lesbian Students*, *supra* at 1051. In sharp contrast to the absolute entitlement of plaintiff to attend school if she returns, a tenant who moves out of subsidized housing during litigation has no absolute entitlement to the benefit if he wishes to return, and thus *Carson v. Pierce*, 719 F.2d 931 (8th Cir. 1983), cited by Yonkers defendants, is not in point. *Cf*., *Daubner v. Harris*, 514 F. Supp. 856 (S.D.N.Y. 1981), *affirmed*, 688 F.2d 815 (2d Cir. 1981) (Attenuated due process rights for applicants for subsidized housing).

The Yonkers defendants rely upon this Court's remark to the effect that additional procedures at the local district level might be of little utility. *Orozco by Arroyo v. Sobol*, 674 F.Supp at 129. Plaintiff agrees that written notice alone is insufficient. For that reason, she seeks more than the plaintiff in Takeall sought, the added procedural protection of an opportunity for a hearing and a determination by the Commissioner which will determine the district of residence. This term, the Supreme Court again rejected an outcome determinative or "harmless error" view of procedural due process, under which procedural violations are tolerated if a court believes that the outcome would be unchanged if procedural due process had been afforded to the plaintiff. As stated by the United States Supreme Court:

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[22] One need not be a prophet to anticipate that Mount Vernon, which now claims plaintiff never established residence, would claim, if the new regulation were in effect, that it is "not the district in which the homeless child was entitled to attend school." Proposed 8 NYCRR §100.2(x)(ii).

> "A judgment entered without notice or service is constitutionally infirm. 'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections' [citation omitted] Failure to give notice violates 'the most rudimentary demands of due process of law.' [citations omitted]"

Peralta v. Heights Medical Center, -- U.S. --, 108 S. Ct. 896, at 899 (1988). When there is a violation of due process, the Supreme Court would not allow the underlying merits of the matter to be determined, and reiterated that "only 'wip[ing] the slate clean . . . would have restored the petitioner to the position he would have occupied had due process been accorded to him in the first place.' The Due Process Clause demands no less in this case." Peralta, supra, 108 S. Ct. at 900. While there should be no assumption that requiring defendants to write down their reasons and to provide a legal justification for their denials would be futile,[23] neither should it be assumed that plaintiff would not have proven her residence had she been afforded the hearing she contends is required by due process of law. The plaintiff alleged that she could have shown sufficient contacts to demonstrate her residence in Mount Vernon; alternatively, she may have shown she was entitled to attend the Yonkers schools. Accepting the outcome determinative or "harmless procedural error" view of due process results in the absurdity of requiring procedural safeguards only when the individual has shown that they were not needed to establish a claim. Instead, procedural due process must be followed in all cases, to afford notice and the opportunity to be heard to establish one's claims on the record of the proceedings, and to afford minimum safeguards against arbitrary government action.

This could be accomplished by a local hearing, such as that under Section 3214 of the New York Education Law for pupils being suspended for disciplinary reasons for more than five days, with an expedited review by the State Commissioner available to the denied applicant. Or, it could be accomplished by a state hearing or an informal variant of the Section 310 process. While due process is flexible, and defendants have several options to tailor its requirements to the needs of efficient school administration, there must be a way for denied school applicants to prove their residence at a hearing and to obtain a binding decision by the State Commissioner without the complexity of a Section 310 appeal.

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[23] As stated recently by the New York State Department of Education, "[s]uch a process should also help to assure that local school officials fully consider their decisions and treat people equitably." N.Y.S. Register, Vol. X issue 13, March 30, 1988, Regulatory Impact Statement for Amendment of 8 NYCRR §100.2(4), "Determination of Eligibility to Attend School."

POINT VI

THE DAMAGES CLAIMS ARE NOT MOOT

Plaintiff has asserted claims for damages against the state and local defendants. Second Amended Complaint, §§34-37, 46. Plaintiff's right to pursue a claim for nominal, compensatory and punitive damages in an action under Section 1983 is well established in the case law and legislative history of Section 1983 litigation. E.g., Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042 (1978); Monroe v. Pape, 365 U.S. 167, 172-183, 81 S.Ct. 473, 476-481, 5 L.Ed.2d 492 (1961); Id. at 225-234, 81 S.Ct. 504-509 (Frankfurter J., dissenting in part); Mitchum v. Foster, 407 U.S. 225, 238-242, 92 S.Ct. 2151, 2159-2161, 32 L.Ed.2d 705 (1972). Section 1983 was intended to "[create] a species of tort liability" where those such as plaintiff, who have been deprived of constitutional protection, can recover damages. Imber v. Pachtman, 424 U.S. 409, 417, 96 S.Ct. 984, 996, 47 L.Ed.2d 128 (1976). The pendency of a damages claim bars dismissal for mootness even in cases where claims for prospective injunctive relief have been mooted. Powell v. McCormack, 395 U.S. 486, 495-500, 89 S.Ct. 1944 (1969); Ellis v. Blum, 643 F.2d 68, 85 (2d Cir. 1981); Davis v. Village Park Realty Co., 578 F.2d 461, 463 (2d Cir. 1978).

POINT VII

PLAINTIFF HAS STATED A CLAIM

The State Commissioner has moved to dismiss for failure to state a claim. On a motion to dismiss, the facts alleged in the complaint and in the plaintiff's supporting affidavits, as well as the reasonable inferences from such allegations, must be taken as true. Hospital Bldg. Co. v. Trustees of Rex Hospital, 425 U.S> 738, 740 (1976); Conley v. Gibson, 355 U.S.41, 45-46, 78 S. Ct. 99 (1957); Quackenbush v. Johnson City School Dist., 716 F.2d 141, 143 (2d Cir. 1983); Escalera v. New York City Housing Authority, 425 F.2d 853, 857 (2d Cir. 1970); Holmes v. New York City Housing Authority, 398 F.2d 262, 265 (2d Cir. 1968).

The Mount Vernon and Yonkers defendants excluded Sixta Orozco from school without any process at all. There was neither written notice of the factual and legal rationale for their actions, nor notice of any meaningful opportunity for a hearing, nor the availability of review and a decision by the Commissioner of Education. Clearly plaintiff has stated a claim upon which relief could be granted. Memphis Light Gas and Water Div. v. Craft, 436 U.S. 1, 98 S.Ct. 1554 (1978). Applicants as well as recipients are entitled to some process when their claims are extinguished by administrative action. Kelly v. Wyman, 294 F.Supp 839, 904 (S.D.N.Y. 1968), affirmed Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011 (1969) ("the applicant, at some stage of the proceedings prior to such [final] denial must be adequately informed of the nature of the evidence against him and be accorded an opportunity to rebut this evidence"). Accord, Gonzales v. Blum, 127 Misc.2d 558, 486 N.Y.S.2d 558 (Sup. Ct. Westchester Co. 1985) (Applicants for public assistance benefits entitled to notice and hearing on application denial).

It is well established that due process requires notice and an opportunity for a hearing before property interests are extinguished. As the Supreme Court recently stated:

> " 'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections'. [citation omitted] Failure to give notice violates 'the most rudimentary demands of due process of law.' [citations omitted]"

Peralta v. Heights Medical Center, ___ U.S. ___, 108 S. Ct. 896, at 899 (1988).

Plaintiff's right to at least nominal damages in a Section 1983 action is well recognized. The Supreme Court in Carey v. Piphus, 98 S.Ct. 1042, 1054, 435 U.S. 247, (1978) held that the denial of procedural due process is actionable for nominal damages without proof of actual injury. By obtaining prompt injunctive relief in this Court, plaintiff may have averted more substantial injury than that which is alleged in the complaint. Her damages cannot be measured by out of pocket losses, and her ultimate recovery of damages may not be overwhelming. Even so, she is entitled to seek and recover nominal damages. As stated by the Court of Appeals for the Second Circuit:

> "Although this may influence the size of the award, it does not preclude recovery. If the wrong complained of is a mere technical violation of plaintiff's constitutional rights and she is unable to prove actual damage, she would nevertheless be entitled to a recovery of nominal damages. in the recent case of Carey v Piphus, * * * * the Supreme Court explained, in connection with a violation of the right to procedural due process, that '[b]y making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed.'"

Davis v. Village Park II Realty Co., 578 F.2d 461, 463 (2d Cir. 1978).

The claims for damages in this case, however, have not been tried and we cannot predict what amounts would be awarded for emotional and mental distress, and possibly punitive damages. Carey v. Piphus, supra; Davis v. Village Park II Realty Co., 578 F.2d at 463. The school boards are also liable under Monell v. Department of Social Servs., 436 U.S. 658, 695, 98 S.Ct. 2018, 2038 (1978). The individual local defendants are policy making officials of the respective school boards, and the boards have not contended that they acted in any way contrary to board policies, rules or procedures. As this Court recently stated:

> "[F]or there to be municipal liability in this case, plaintiff must have been deprived of his property entitlement pursuant to official policy or regulation. Monell v. Department of Social Serv., 436 U.S. 658, 690 (1978). The Supreme Court recently reaffirmed its view that an unconstitutional governmental policy may be inferred from a single decision taken by the highest officials responsible

for setting policy in a particular area of the government's business. City of St. Louis v. Praprotnick, 108 S. Ct. 915, 923 (1988).

Courtemanche v. Enlarged City School District of the CIty of Middletown, -- F. Supp. --, 1988 U.S. Dist. LEXIS 4024 (S.D.N.Y. 1988).

The claims in the Second Amended Complaint are buttressed by plaintiff's supplemental affidavit of March 4, 1988. The affidavit of plaintiff's mother and Next Friend, Margarita Arroyo describes plaintiff's mental and physical state following defendant's refusal to admit her to school. Essentially, the plaintiff was waved away from the schoolhouse doors with oral rejections by school officials, who left little or no paper trail of their refusals to educate her. Plaintiff was "obviously confused" when her mother was unable to explain why plaintiff was being excluded from school. (Plaintiff's March 4, 1988 Supplemental Affidavit, paragraph 12) During the time plaintiff was unable to attend school due to defendants' refusal to admit her, she is described by her mother as being "...depressed...", "...very unhappy..." "...sad and despondent..." and "...withdrawn..." Plaintiff's mother states that she could "see the hurt in (plaintiff's) expression . . . and that it was obvious how "desperate (plaintiff) was to attend school". Plaintiff's March 4, 1988 Supplemental Affidavit paragraphs 12, 13, 16 and 17.

The alleged mental and emotional distress actually caused by defendants' acts and omissions in violation of procedural due process will, of course, need to be proved at trial. Plaintiff remains in contact with her counsel, she has answered the interrogatories from Puerto Rico, and she will continue to make herself available for further discovery and trial of the factual issues in the case.

The Claim against the State Commissioner

The only official capable of making an administratively "binding" or final decision resolving the inter-district conflict is the State Commissioner. Yonkers has no administrative power or authority to make a binding decision that a child resides in Mount Vernon, and Mount Vernon cannot make a binding decision regarding Yonkers' obligation to educate a child. Only the Commissioner is empowered to make such a decision. But he does not hold or require the districts to hold an evidentiary hearing on the question of residence, and he has no system to resolve residence disputes that is readily invocable by the denied school applicant. Contrary to this Court's belief that there is a speedy state remedy for resolution of school residence disputes, the Commissioner has yet to decide a pupil residency case submitted last September. That case, Matter of Tynan v. Spackenkill, is described in the Affidavit of John T. Hand, previously submitted in support of Plaintiff's motion for a preliminary injunction. The timetable of events in that case underscores the inadequacy of the Commissioner's procedures, even where the pupil is represented by counsel:

Patty Tynan o/b/o herself and her minor children, v. Richard Wooly, Supt of Schools, Spackenkill Union Free School District,

-Denied school admission on 8/31/87 without written notice;

-Commenced appeal under §310 on 9/3/87 by federal express, filing fee paid by Westchester Legal Services;

-Answer from Spackenkill, requesting, inter alia, joinder of another school district; dated 9/7/87 and mailed 9/9, received by petitioner's counsel on 9/11.

-Petitioner's Verified Reply served on 9/21/87;

-Commissioner granted stay on 9/22/87

-Petitioner's memo of law served on Oct 6, 87

-June 2, 1988, still sub judice

The Commissioner's stay was granted 22 days after the denial. The Tynan case required more than 20 hours of an attorney's time to draft the pleadings and brief, and it cannot be assumed that counsel is readily available to handle such matters.[24] Accordingly, the Commissioner's system for making residence determinations predictably leads to school exclusions of the sort encountered by the plaintiff without an opportunity for a prompt hearing, and he may be held accountable in damages for not preventing such predictable injury. Duchesne v. Sugarman, 566 F.2d 817 (2d Cir. 1977). As the Court of Appeals for the Second Circuit stated in Duchesne, state and local officials may be held liable for damages under Section 1983 if their policies or practices lead to due process violations, and it makes no difference whether the violations occur as a result of their action or inaction. Duchesne, supra 566 F.2d at 832. Analogously, high federal officials are potentially liable for damages in Bivens actions where the system they devise or are responsible for predictably lead to due process denials. Ellis v. Blum, 643 F.2d 68, 85 (2d Cir. 1981) (Cabinet secretary potentially liable for damages due to due process violations).

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[24] Affidavit of Julie Mills, dated Nov. 20, 1987, §14.

Defendants rely heavily upon Campo v. New York City Employee's Retirement System, -- F.2d --, (2d Cir. No. 87-7237 March 31 1988). In that case, the plaintiff sought an administrative hearing on her derivative claim to a contractual public pension benefit of her deceased husband. The Court of Appeals, determining the merits of her claim, found that she could get the hearing required by due process in a state court Article 78 proceeding. Id, slip opinion at 2382. Campo is readily distinguishable. The adequacy of the state court remedy was premised upon the fact that the alleged deprivation was "an isolated instance," and did not result "from a practice or custom" of the agency. Id., slip opinion at 2376, fn4. In contrast, plaintiff has alleged, and defendants have not controverted, that there exists in New York State a custom or practice of allowing school admission officials simply to deny admissions for nonresidence without any notice or any opportunity for a hearing. Nothing in Campo or even Parratt v. Taylor, 451 U.S. 527 (1981), upon which Campo is premised, supports the view that agencies may adopt a "sue me in state court" posture without providing some kind of hearing opportunity when statutory entitlements such as welfare (Goldberg v. Kelly, 397 U.S. 254 (1969)) or universal public education (Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729 (1975)) are at stake. As the Supreme Court recently reiterated, "education is perhaps the most important function of state and local governments." Honig v. Doe, -- U.S. --, 108 S.Ct. 592, 596 (1988), quoting Brown v. Board of Education, 347 U.S. 483, 493, 74 S.Ct. 686, 691 (1954). The deprivation of education by the state, pursuant to an established custom or practice, without due process, requires, we submit, a process more like that afforded to the Goldberg plaintiffs whose claim to welfare payments was being extinguished, and less like the process afforded to the prisoner in Parratt, whose cigarettes were snatched by a prison guard acting contrary to established norms.

Defendants also rely upon Horton v. Marshall Public Schools, 769 F.2d 1323 (8th Cir. 1985), which actually supports plaintiff's argument. In that case, the Eighth Circuit said that a school excluding a pupil for nonresidence must "give the student notice of the reasons for which he will be excluded from school and an opportunity to respond to and contest those reasons if he so desires." Id., 769 F.2d at 1334 (emphasis supplied). The defendants in Horton has actually provided such process. Ibid. The Horton case also illustrates a significant issue regarding the process that is due the plaintiff. The Arkansas scheme at issue in Horton determined a pupil's school attendance upon the actual presence in the district of a parent or guardian. Under that standard, the Court held that due process did not require an evidentiary type hearing because the facts were generally of the type that were easily verified. In contrast, New York's scheme differs from that of Arkansas, in that a long line of authority holds that physical presence or absence of a parent in a district is not always determinative of residence. See, e.g., Matter of Richards, attached to the complaint, and cases cited therein. New York's standard hinges upon case by case analysis of the facts, including the intent of the parent and the circumstantial evidence surrounding the application for school admission. Significantly, the Horton court said it would be "impractical" to provide a hearing regarding "objective and typically disputable facts such as those involved in this case. Absent some indication that there is a dispute regarding such facts" a hearing was not necessary. Horton, supra at 1334.

Certainly, at this stage of proceedings, it cannot be said that the facts alleged do not support a valid claim against the defendants for some relief, whether it be damages or declaratory relief or prospective injunctive relief.

POINT VIII

THE STATE COMMISSIONER IS NOT ABSOLUTELY IMMUNE

The State commissioner asserts the defense of absolute immunity because of his claimed "legislative" capacity.[25] The defense rests upon a distortion of plaintiff's claim against the State Commissioner. He says the plaintiff's claims boil down to a complaint that he has not promulgated certain regulations; that the Board of Regents is the real party in interest because it must approve any regulation he proposes, that the Commissioner and the State Board of Regents are like a "Governor" and a Legislature, and that plaintiff is barred from any relief because the remedy is "legislative" in nature.

If full due process could be afforded by the local districts alone, there might be some plausibility to the Commissioner's claim that he need not instruct local schools to do what the Constitution already requires. Plaintiff's claims, however, go much further than that, and thus the Court need not reach that difficult issue. Under the State scheme, only the Commissioner has administrative jurisdiction to make a binding decision as to which of two districts is the appropriate district of residence. Because the State Commissioner has not devised any effective recourse, pupils are subject to exclusion from school due to inconsistent residence determinations by local school districts which cannot bind one another by their decisions. It is the lack of effective recourse to the Commissioner to resolve residence disputes which leads to a taking or defeat of the pupil's claim of entitlement without due process.

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[25] State Commissioner's Memorandum, p.20.

The State Commissioner's claim of absolute judicial immunity is similarly without merit.[26] He contends that "[i]n appeals pursuant to N.Y.Ed.L. §310, the Commissioner functions as a quasi-judicial officer."[27] Because there is no pending appeal pursuant to Section 310 of the New York Education Law, and plaintiff seeks no order of this court relating to any particular proceeding under Section 310, the argument is misdirected.

Plaintiff has alleged the existence of very substantial burdens upon the denied school applicant, whose only remedy under the existing system is the Section 310 appeal. These burdens, e.g., the filing fee, the pleading burden, the formal, typewritten papers, the service requirements, the briefing and stay practice, taken as a whole, denied the plaintiff, who was unrepresented by counsel at the relevant time of her denial, a meaningful hearing at a meaningful time. The State Commissioner apparently misreads the criticism of the adequacy of the Section 310 appeal process in this situation. There are at least several constitutional solutions to the problem. One remedy might lie in revamping the Section 310 process to suit the needs of this type of case. An equally constitutional remedy might lie in the creation of a less formal remedy for the pupil who is not attending school, without changing any procedures of the formal Section 310 appeal. Apart from insistence upon the rudiments of due process, plaintiff does not ask this court to be a super legislature. Rather, it should be left to the defendants to devise a scheme which both satisfies the minimal constitutional requirements of due process and meets their administrative needs.

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[26] State Commissioner's Memorandum, p. 20-21.

[27] *Id*. at 21.

POINT IX

THE STATE COMMISSIONER HAS NOT ESTABLISHED QUALIFIED IMMUNITY

The State Commissioner contends that he enjoys qualified immunity from the damages claim.[28] If the defendants had required adherence to some process, even a faulty process, before pupils are turned away from schoolhouse doors by local school officials, they probably could not be held personally liable for constitutional defects in the process. See Davis v. Scherer, 468 U.S. 183, 104 S.Ct. 3012 (1984) (No individual liability of school official who in good faith had promulgated a constitutionally defective process for post-termination hearings for teachers). Such a defense is unavailable here, because the Commissioner had no rule at all requiring notice to denied school applicants: only after this and other similar litigation did he recently propose a regulation which begins to address the subject. Clearly, the school officials in Davis v. Scherer, supra, would have been liable for damages if they had no administrative procedure at all for a hearing before or after a teacher's employment termination. Cf., Courtemanche v. Enlarged City School District of the City of Middletown, -- F.Supp. --, 1988 U.S. Dist. LEXIS 4024 (S.D.N.Y. 1988), where this Court stated:

> "[D]etermining just how much process was due [a terminated School Superintendent] may present a closer question than would appear at first glance. Compare Cleveland Bd. of Educ. v. Loudermill, 470

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[28] State Commissioner's Memorandum, p.26.

> U.S. 532, 542 (1985) (holding that "root requirement" of due process generally dictates hearing prior to termination of employment) with Giglio v. Dunn, 732 F.2d 1133, 1134-35 (2d Cir.), cert. denied, 469 U.S. 932 (1984), cited with approval in Campo v. New York City Employees' Retirement Sys., No. 87-7237, slip op. at 2379-80 (2d Cir. Mar. 31, 1988) (denying teacher's section 1983 claim, based on his allegedly coerced resignation, since availability of Article 78 hearing under New York law constituted sufficient post-deprivation hearing in accord with due process)."

Id. Certainly it is inappropriate to decide on this motion the details of the process that is due the denied school applicant.

If the State Commissioner had a constitutionally adequate process of the type sought by plaintiff, we agree that he could not be liable for occasional random deprivations of due process due to non-compliance with the procedure by subordinate officials. Rizzo v. Goode, 423 U.S. 362, S. Ct. (1976) (Doctrine of respondeat superior not available where existing procedures for controlling police misconduct were adequate, where constitutional violations were contrary to department policy, and unconstitutional departures from department norms were unpredictable and sporadic). But here, it is clear that there was no statute, regulation of the Commissioner or local rule of the school boards requiring any written notice or a hearing of any type on denial of a pupil's application for school. The system allowed notice-less, hearing-less, summary denials of education. Plaintiff has fairly alleged, if not established, that this is a policy, custom, or usage of all the defendants. Significantly, not one of the defendants has expressed any indication that the process afforded the plaintiff was inconsistent with their rules, regulations, practices, policies, customs or usages. Accordingly, the State Commissioner is accountable in damages for the constitutional infirmity of the procedures.

CONCLUSION

For all of the foregoing reasons, plaintiff respectfully prays that the Court deny the defendants' motions to dismiss, direct them to answer the Second Amended Complaint, and grant such other and further relief as to the Court seems just and proper.

June 2, 1988

Respectfully submitted,

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